(1)

No. 99-5153-CFY Title: Cornell Johnson, Petitioner
v.
United States

Docketed:
July 7, 1999

Court: United States Court of Appeals for the Sixth Circuit

Entry	Date	Proceedings and Orders
	Jul 2 1999	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due September 29, 1999)
	Jul 13 1999	Waiver of right of respondent United States to respond filed.
	Jul 22 1999	DISTRIBUTED. September 27, 1999
	Jul 29 1999	Response requested. (Due August 30, 1999 - NONE RECEIVED)
	Aug 26 1999	Order extending time to file response to petition until September 29, 1999.
	Sep 17 1999	Brief of respondent United States in opposition filed.
	Sep 30 1999	REDISTRIBUTED. October 15, 1999
	Oct 18 1999	Petition GRANTED. SET FOR ARGUMENT February 22, 2000. **********
	Oct 26 1999	Record filed.
	Nov 10 1999	Record filed.
	Nov 12 1999	Joint appendix filed.
	Dec 2 1999	Brief of petitioner Cornell Johnson filed.
	Dec 2 1999	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
	Dec 16 1999	Order extending time to file respondent's brief on the merits to and including January 10, 2000. The reply brief is to be filed with this office and served upon opposing counsel on or before February 14, 2000.
	Dec 17 1999	CIRCULATED.
	Jan 10 2000	Brief of respondent United States filed.
	Feb 14 2000	Reply brief of petitioner Cornell Johnson filed.
	Feb 22 2000	ARGUED.

(2)

99-5153

NO. 98-5664

ORIGINAL

Supreme Court, U.S.
F I L E D
1999
OFFICE OF THE CLERK

IN THE UNITED STATES SUPREME COURT

OCTOBER 1998 TERM

UNITED STATES OF AMERICA,

Respondent

V.

CORNELL JOHNSON,

Petitioner

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RITA LaLUMIA
Assistant Federal Community Defender
FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.
707 Georgia Avenue, Suite 203
Chattanooga, Tennessee 37402
(423) 756-4349

Counsel for Petitioner

85 pp
10

NO. 98-5664

IN THE UNITED STATES SUPREME COURT

OCTOBER 1998 TERM

UNITED STATES OF AMERICA,

Respondent

V.

CORNELL JOHNSON,

Petitioner

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RITA LaLUMIA
Assistant Federal Community Defender
FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.
707 Georgia Avenue, Suite 203
Chattanooga, Tennessee 37402
(423) 756-4349

Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Sixth Circuit erred in concluding that the district court properly imposed a "tail" of supervised release following incarceration after revoking Petitioner's initial term of supervised release, in violation of the Ex Post Facto Clause of the United States Constitution.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE AND FACTS	4
REASONS FOR GRANTING OF THE WRIT	5
CONCLUSION	10
CERTIFICATE OF SERVICE	11
APPENDIX	12

TABLE OF AUTHORITIES

	Page
United States Supreme Court Cases:	
Miller v. Florida, 482 U.S. 423, 430, 107 S.Ct. 2446, 2451 (1987)	6, 10
United States Court of Appeals Cases:	
Calder v. Bull, 3 Dall. 386, 1 L.Ed 648 (1798)	6
United States v. Beals, 87 F.3d 854, 857 (7th Cir. 1996)	6
United States v. Brady, 88 F.3d 225, 228-229 (3rd Cir.), *cert. denied*, 117 S.Ct. 773 (1997)	9
United States v. Collins, 118 F.3d 1394 (9th Cir. 1997)	8
United States v. Dozier, 119 F.3d 239 (3rd Cir. 1997)	8, 9
United States v. Evans, 87 F.3d 1009, 1010-11 (8th Cir. 1996)	9
United States v. Lominac, 144 F.3d 308, 315 (4th Cir. 1998)	6-8
United States v. Meeks, 25 F.3d 1117 (2nd Cir. 1994)	8, 9
United States v. Parriett, 974 F.2d 523 526 (4th Cir. 1992). .	9
United States v. Paskow, 11 F.3d 873, 876 (9th Cir. 1993)	9
United States v. Reese, 71 F.3d 582, 584 (6th Cir.), *cert. denied* 116 S.Ct. 2529 (1995)	7, 8, 10
United States v. Schrader, 973 F.2d 623, 624-25 (8th Cir. 1992)	9
United States v. St. John, 92 F.3d 751, 766-67 (8th Cir. 1996)	9
United States v. Truss, 4 F.3d 437, 438-39 (6th Cir. 1993)	5
United States v. Wash, 97 F.3d 1465 (10th Cir. 1996)	9
United States v. Withers, 128 F.3d 1167 (7th Cir. 1997)	6

Page

Constitutional, Statutory, and Regulatory Provisions:

18 United States Code, Section 3583 5

18 United States Code, Section 3583(e) 7

18 United States Code, Section 3583(e)(3) 3, 6

18 United States Code, Section 3583(g) 8, 9

18 United States Code, Section 3583(h) 3, 5-9

28 United States Code, Section 1254(1) 2

Federal Rules of Criminal Procedure, Rule 32.1(b) 7

United States Constitution, Article 1, Section 9, Clause 3 (the Ex Post Facto Clause) ii-6, 8-10

United States Supreme Court Rules, Rule 13 2

OPINIONS BELOW

1. Opinion, United States Court of Appeals for the Sixth Circuit, United States of America v. Cornell Johnson, C.A. No. 98-5664 (6th Cir., April 29, 1999) (not recommended for full text publication).

2. Judgment in a Criminal Case, United States District Court for the Eastern District of Tennessee at Chattanooga, United States of America v. Cornell Johnson, District Court No. 1:93-cr-00138, May 1, 1998.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit entered its opinion in this case on April 29, 1999. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1). Rule 13 of the Supreme Court allows for ninety days within which to file a petition for a writ of certiorari after entry of judgment by the appellate court. Accordingly, this petition is timely filed.

Petitioner, Cornell Johnson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit. In that opinion, the Sixth Circuit affirmed the sentence of Petitioner.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article 1, Section 9, Clause 3 (the Ex Post Facto Clause): "No Bill of Attainder or ex post facto Law shall be passed."

Chapter 18, United States Code, Section 3583(h): "When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term of imprisonment authorized under subsection (e)(3), the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release."

STATEMENT OF THE CASE AND FACTS

Petitioner Cornell Johnson was originally convicted on February 28, 1994, for a Class D felony, and was sentenced to 25 months in prison followed by a three-year term of supervised release.

On April 30, 1998, Petitioner appeared in federal court to answer various allegations that he had violated his supervised release conditions by committing another crime and leaving the jurisdiction without permission. Petitioner admitted these violations, and his supervised release was revoked. The applicable policy guidelines were 18 to 24 months, and the district court sentenced Petitioner to 18 months in prison to be followed by 12 months of supervised release. Petitioner argued that the reimposition of supervised release violates the Ex Post Facto Clause of the United States Constitution. The district court denied the Petitioner's motion.

REASONS FOR GRANTING OF THE WRIT

The United States Court of Appeals for the Sixth Circuit erred in concluding that the district court properly imposed a "tail" of supervised release following incarceration after revoking Petitioner's initial term of supervised release, in violation of the Ex Post Facto Clause of the United States Constitution.

On September 13, 1994 Congress amended 18 U.S.C. § 3583 to allow district courts to reimpose a term of supervised release after revoking the original term of supervision and requiring a term of imprisonment. 18 U.S.C. § 3583(h). Prior to that amendment, district courts generally did not have the authority to reimpose supervision after ordering imprisonment from a supervised release revocation hearing. Thus, when Petitioner committed his crime in 1993, which resulted in a term of imprisonment as well as a term of supervised release, he was not subject to the reimposition of supervision if his supervised release term were to be revoked. *United States v. Truss*, 4 F.3d 437, 438-39 (6th Cir. 1993).

Because § 3583(h) allows the imposition of an additional term of supervision following a term of incarceration, Petitioner contends that § 3583(h) violates ex post facto prohibitions by subjecting him to a greater punishment for his original crime than was available at the time he committed the crime.

The Ex Post Facto Clause states: "No Bill of Attainder or ex post facto Law shall be passed." U.S. Const. art. I, § 9, cl. 3. An early decision relating to the Ex Post Facto Clause was rendered by the United States Supreme Court in *Calder v. Bull*, 3 Dall. 386, 1 L.Ed 648 (1798). In *Calder*, the Supreme Court set down four pronouncements concerning the Ex Post Facto Clause, including a statement that the Ex Post Facto Clause is violated by "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Id.* at 390. More recently, a two-prong test has been applied to determine whether the application of a law violates the Ex Post Facto Clause. First, the law must apply to events before its enactment and, second, the law must disadvantage the offender affected by it. *Miller v. Florida*, 482 U.S. 423, 430, 107 S.Ct. 2446, 2451 (1987).

Looking at the second element first, it is clear that § 3583(h) works at a disadvantage to this Petitioner. *United States v. Lominac*, 144 F.3d 308, 315 (4th Cir. 1998). When a defendant has his supervised release revoked, he receive no credit for "time previously served on post release supervision." See 18 U.S.C. §3583(e)(3). Now, after application of subsection (h) a defendant can serve multiple terms of supervised release and lose multiple periods of "street time" after the initial revocation. *United States v. Beals*, 87 F.3d 854, 857 (7th Cir. 1996); overruled by *United States v. Withers*, 128 F.3d 1167 (7th Cir. 1997). Applying common sense, the Rules of Criminal Procedure, and the reasoning of a decision such as that in *Lominac,* it is clear that further time

on supervised release is not favorable to a defendant. Fed R.Crim.P. 32.1(b) ("an extension of the term of probation or supervised release is not favorable to the person for the purposes of this rule"); *Lominac*, 144 F.3d at 315 (Under § 3583(h), in addition to the court's ability to sentence a defendant to a term of imprisonment, the court may impose a new term of supervised release that constitutes a potential punishment greater than that under § 3583(e) alone.)

After determining that subsection (h) works to a defendant's disadvantage, the question becomes whether or not the defendant's new punishment "should be considered the continuing legal consequence of the defendant's original crimes, or viewed instead as the independent legal consequence of a defendant's later misconduct." *United States v. Reese*, 71 F.3d 582, 584 (6th Cir.), *cert. denied* 116 S.Ct. 2529 (1995). The Petitioner's reinstatement on supervised release is a consequence of the original crime, not the consequence of his later misconduct.

This is so because there may be misconduct which triggers a violation of supervised release that is not "illegal." For example, a defendant can violate supervised release conditions for failing to work, failing to fill out a monthly report or, as here, leaving the judicial district without prior approval. These actions, although not criminal can, and in fact do, serve as the grounds for revocation of supervised release. The *Reese* panel focused on the fact that Defendant Reese "repeatedly tested positive for drugs" and would have suffered no ill effect had he been able to conform his conduct to legal

requirements. 71 F.3d at 590. Even where the revocation is based on allegations that the defendant has committed a crime while on supervised release, the additional punishment in the form of reimposition of supervised release following a term of incarceration constitutes additional penalties for the original crime which would not have been available at the time the original crime was committed.

At least four circuits have expressly decided that the retrospective application of § 3583(h) violates the Ex Post Facto Clause. *United States v. Lominac*, 144 F.3d 308 (4th Cir. 1998); *United States v. Dozier*, 119 F.3d 239 (3rd Cir. 1997); *United States v. Collins*, 118 F.3d 1394 (9th Cir. 1997); and *United States v. Meeks*, 25 F.3d 1117 (2nd Cir. 1994). In *Collins*, the Ninth Circuit found that the "district court here applied § 3583(h) to punish deeds of [the defendant's] that occurred before the section's enactment," even though the actions which constituted the violations occurred after § 3583(h) became effective. *Collins*, 118 F.3d at 1397. The Ninth Circuit also noted that "violation of a condition of supervised release is accordingly not a new substantive offense for purposes of the Ex Post Facto Clause," and that such violations are often not crimes at all, and "the punishment that follows such a violation is imposed on the authority of conviction for the underlying offense." *Id*.

Some circuits have also considered the ex post facto issue with respect to the mandatory prison requirement of § 3583(g). The Second, Fourth and

Ninth Circuits have found that § 3583(g) and its retrospective punishment violates the Ex Post Facto Clause inasmuch as the mandatory prison requirement is a "consequence of the offender's underlying crime [just] as is the initial term of imprisonment." *United States v. Meeks*, 25 F.3d 1117 (2nd Cir. 1994); *United States v. Paskow*, 11 F.3d 873, 876 (9th Cir. 1993); *United States v. Parriett*, 974 F.2d 523 526 (4th Cir. 1992).

Other circuits have examined § 3583(h) and found that its retrospective application does not violate the Ex Post Facto Clause. *United States v. St. John*, 92 F.3d 751, 766-67 (8th Cir. 1996); *United States v. Brady*, 88 F.3d 225, 228-229 (3rd Cir.), *cert. denied*, 117 S.Ct. 773 (1997); *United States v. Evans*, 87 F.3d 1009, 1010-11 (8th Cir. 1996). However, it must be noted that those circuits have given a qualified acceptance of §3583(h) and its retrospective application: the Third Circuit now differentiates between revocation from a Class A felony as was the case in *Brady*, or a Class B, C, or D felony as was the case in *Dozier*. See *Dozier*, 119 F.3d at 243-44. The Eighth Circuit has always allowed for reimposition of supervised release after revocation, even before the enactment of §3583(h), and accordingly there is no ex post facto concern for that circuit. *United States v. St. John*, 92 F.3d at 765; *United States v. Schrader*, 973 F.2d 623, 624-25 (8th Cir. 1992). The Tenth Circuit also approved the retrospective application of § 3583(h) in an unpublished opinion, *United States v. Wash*, 97 F.3d 1465 (10th Cir. 1996)

(relying in part on Tenth Circuit precedent allowing imposition of a new term of supervised release after revocation).

In summary, Petitioner submits that the two-prong test of *Miller v. Florida* is met: the district court has applied a law to events occurring before the law's enactment, and Petitioner was disadvantaged by the application of the law to him. *Miller*, 107 S.Ct. at 2451; *Reese*, 71 F.3d at 585.

CONCLUSION

The reimposition of supervised release after revocation of supervised release and incarceration in prison violates the Ex Post Facto Clause. Petitioner respectfully requests a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to reverse its ruling to the contrary.

Respectfully submitted,

FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.

By: Rita LaLumia
Rita LaLumia

The Flatiron Building
Suite 203
707 Georgia Avenue
Chattanooga, TN 37402
(423) 756-4349

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing has been served upon the Solicitor General, Department of Justice, 10th Street and Constitution Avenue, Washington, D.C., 20530, and to Mr. Gary Humble, Assistant United States Attorney, 1110 Market Street, Chattanooga, Tennessee, 37402, by placing a true and exact copy of same in the United States Mail, with sufficient postage thereon to carry the same to its destination.

This the 29th day of June, 1999.

Rita LaLumia
Rita LaLumia

NO.98-5664

IN THE UNITED STATES SUPREME COURT

OCTOBER 1998 TERM

UNITED STATES OF AMERICA,

Respondent,

V.

CORNELL JOHNSON,

Petitioner.

APPENDIX

RITA LaLUMIA
Assistant Federal Community Defender
FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.
707 Georgia Avenue, Suite 203
Chattanooga, Tennessee 37402
(423) 756-4349

Counsel for Petitioner

No. 98-5664

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
APR 29 1999
LEONARD GREEN, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CORNELL JOHNSON,

Defendant-Appellant.

ORDER

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 206 limits citation to specific situations. Please see Rule 206 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
This notice is to be prominently displayed if this decision is reproduced.

Before: MARTIN, Chief Judge; BOGGS and COLE, Circuit Judges.

Cornell Johnson, represented by counsel, appeals a district court judgment imposing a new term of supervised release, following the revocation of his original term of supervised release. The parties have expressly waived oral argument, and this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

In 1994, Johnson pleaded guilty to conspiring to defraud, produce, use, and traffic in one or more counterfeit access devices, in violation of 18 U.S.C. § 1029(b)(2). The district court sentenced him to twenty-five months of imprisonment, plus three years of supervised release. While on supervised release, Johnson committed various state law offenses in Virginia, and he left the judicial district without permission. During a revocation hearing, Johnson admitted that he had violated the terms of his original supervised release, and the district court sentenced him to eighteen months of imprisonment, plus twelve months of supervised release. Johnson has filed a timely appeal, arguing that the new term of supervised release violates the Ex Post Facto Clause.

Upon review, we conclude that the district court properly sentenced Johnson. *See United States v. Lloyd*, 10 F.3d 1197, 1220 (6th Cir. 1993), *cert. denied*, 511 U.S. 1043 *and* 1146 *and* 513 U.S. 883 (1994). Johnson's sentence does not violate the Ex Post Facto Clause. In order for a statutory modification of punishment to run afoul of the Ex Post Facto Clause: 1) the statute must apply retroactively to past conduct; and 2) the statute must work to the prejudice or disadvantage of the defendant. *See Miller v. Florida*, 482 U.S. 423, 430 (1987). This court has rejected Johnson's argument, concluding that the application of § 3583(h) does not violate the Ex Post Facto Clause. *See United States v. Abbington*, 144 F.3d 1003, 1005 (6th Cir.), *cert. denied*, 119 S. Ct. 344 (1998); *United States v. Page*, 131 F.3d 1173, 1175 (6th Cir. 1997), *cert. denied*, 119 S. Ct. 77 (1998). Although several other circuits have concluded that the application of § 3583(h) does violate the Ex Post Facto Clause, *see United States v. Lominac*, 144 F.3d 308, 312-16 (4th Cir. 1998); *United States v. Dozier*, 119 F.3d 239, 242-44 (3d Cir. 1997); *United States v. Collins*, 118 F.3d 1394, 1397-99 (9th Cir. 1997); *United States v. Meeks*, 25 F.3d 1117, 1119 (2d Cir. 1994), these cases are not controlling authority in this circuit.

Accordingly, we affirm the district court's judgment.

ENTERED BY ORDER OF THE COURT

Clerk

Filed MAY - 1 1998
Entd. Order Bk. 73 Pg. 50
R. Murry Hawkins, Clerk

AO 245D (Rev. 8/96) Sheet 1 - Judgment in a Criminal Case for Revocations

United States District Court
Eastern District of Tennessee at Chattanooga

UNITED STATES OF AMERICA
v.
Cornell Johnson

JUDGMENT IN A CRIMINAL CASE
(For **Revocation** of Probation or Supervised Release)
(For Offenses Committed On or After November 1, 1987)

Case Number: **1:93CR00138-002**

Perry H. Piper
Defendant's Attorney

THE DEFENDANT:

☒ admitted guilt to violation of condition(s) **#1 and general cond.** of the term of supervision.

☐ was found in violation of condition(s) _____ after denial of guilt.

Violation Number	Nature of Violation	Date Violation Occurred
1	**The defendant failed to comply with the condition that he not commit another federal, state, or local crime.**	03/03/1996
2	**The defendant failed to comply with the condition that he not leave the judicial district without the permission of the Court or probation officer.**	03/03/1996

ATTEST:
A true copy.
Certified this MAY - 1 1998
R. MURRY HAWKINS, CLERK
By: _____ Dep. Cler

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has not violated condition(s) _____ and is discharged as to such violation(s) condition.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: **250-04-0337**
Defendant's Date of Birth: **05/09/1954**
Defendant's USM No.: **84669-071**
Defendant's Residence Address:
845 North Central Avenue #615

Hapeville **GA** **30354**

Defendant's Mailing Address:
845 North Central Avenue #615

Hapeville **GA** **30354**

04/30/1998
Date of Imposition of Judgment

Signature of Judicial Officer

R. ALLAN EDGAR
United States District Judge
Name & Title of Judicial Officer

may 1, 1998
Date

DEFENDANT: Cornell Johnson

CASE NUMBER: 1:93CR00138-002

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 18 month(s).

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at _____ a.m./p.m. on _____.
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before 2 p.m. on _____.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

DEFENDANT: Cornell Johnson

CASE NUMBER: 1:93CR00138-002

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 12 month(s).

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

See Special Conditions of Supervision - Page 4

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

BEST AVAILABLE COPY

DEFENDANT: **Cornell Johnson**

CASE NUMBER: **1:93CR00138-002**

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a program of testing and treatment for drug and alcohol abuse as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.

The defendant shall participate in a program of mental health treatment as directed by the probation officer.

The defendant shall pay any restitution that remains unpaid at the commencement of the term of supervision.

The defendant shall provide the probation officer with access to any requested financial information.

The defendant shall not incur any credit charges or open additional lines of credit without the approval of the probation officer.

DEFENDANT: **Cornell Johnson**

CASE NUMBER: **1:93CR00138-002**

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$	$	$ 3,286.96

☐ If applicable, restitution amount ordered pursuant to plea agreement . . . . . $ _____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ _____

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such a determination.

☒ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	* Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Western Union	**$3,000.00**	**$3,000.00**	
Food Lion, Incorporated	**$286.96**	**$286.96**	
Totals:	$ 3,286.96	$ 3,286.96	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

DEFENDANT: **Cornell Johnson**

CASE NUMBER: **1:93CR00138-002**

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ in full immediately; or

B ☐ $ _____ immediately, balance due (in accordance with C, D, or E); or

C ☐ not later than _____ ; or

D ☐ in installments to commence _____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E ☐ in _____ *(e.g. equal, weekly, monthly, quarterly)* installments of $ _____ over a period of _____ year(s) to commence _____ day(s) after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

Payments shall be made to: U.S. DISTRICT COURT, 800 MARKET ST., SUITE 130, KNOXVILLE, TN 37902

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall forfeit the defer.dant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States attorney.

ORIGINAL

No. 99-5153

Supreme Court, U.S.
FILED
SEP 17 1999
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

CORNELL JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

JAMES K. ROBINSON
Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether, upon the revocation of petitioner's supervised release, the Ex Post Facto Clause precluded the district court from ordering petitioner, under 18 U.S.C. 3583(h) (Supp. 1995), to serve a term of reimprisonment followed by a renewed term of supervised release.

IN THE SUPREME COURT OF THE UNITED STATES

No. 99-5153

CORNELL JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. A1-A2) is unpublished, but may be found at 1999 WL 282679, and the judgment will be noted at 181 F.3d 105 (Table).

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1999. Pet. App. A1. The petition for a writ of certiorari was filed on July 2, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After his supervised release was revoked by the United States District Court for the Eastern District of Tennessee, petitioner was ordered to serve 18 months' reimprisonment, to be followed by 12 months' renewed supervised release. Pet. App. A1. The court of appeals affirmed.

1. After a guilty plea, petitioner was convicted on March 8, 1994, for conspiring to defraud, produce, use, and traffic in one or more counterfeit access devices, in violation of 18 U.S.C. 1029(b)(2), which is a Class D felony.[1] Pet. App. A1; Gov't C.A. Br. 3. Petitioner was sentenced to 25 months' imprisonment, to be followed by three years' supervised release. Pet. App. A1. After he was released from imprisonment and began to serve his term of supervised release, petitioner left the judicial district without permission and committed various state-law offenses in Virginia. Ibid. After a hearing at which petitioner admitted violations of his supervised release, the district court revoked petitioner's supervised release and ordered him reincarcerated for 18 months to be followed by a renewed term of 12 months' supervised release. Ibid.

2. At the time of petitioner's original offense,

[1] Because petitioner's offense of conspiring to commit (but not personally committing) the access-device crime is punishable, under Sections 1029(b)(2) and (c)(1)(A)(i), by up to five years' imprisonment, the offense is a Class D felony under 18 U.S.C. 3559(a)(4).

violations of supervised release were governed by 18 U.S.C. 3583(e) (1988 ed., Supp. IV 1992). That provision authorized the district courts, upon an offender's violation of his supervised release, to "revoke a term of supervised release, and require the person to serve in prison all or part of the term of supervised release without credit for time previously served on postrelease supervision." 18 U.S.C. 3583(e)(3) (1988 ed., Supp. IV 1992). The courts of appeals reached conflicting views on whether that provision authorized a district court to order an offender who violated supervised release to serve a combined term of reimprisonment and renewed supervised release, or whether the court was limited to ordering such an offender to serve a term of reimprisonment.[2]

Effective September 13, 1994 -- after petitioner committed the underlying offense for which he was imprisoned, but before he

[2] The First and Eighth Circuits had ruled that sentencing courts had the power to order offenders to serve terms of reimprisonment to be followed by renewed supervised release, but other circuits disagreed and found no authority to order offenders to serve a renewed term of supervised release. Compare United States v. O'Neil, 11 F.3d 292, 293 (1st Cir. 1993), and United States v. Schrader, 973 F.2d 623, 625 (8th Cir. 1992), with United States v. Koehler, 973 F.2d 132, 134-136 (2d Cir. 1992); United States v. Malesic, 18 F.3d 205, 206 (3d Cir. 1994); United States v. Cooper, 962 F.2d 339, 341-342 (4th Cir. 1992); United States v. Holmes, 954 F.2d 270, 272-273 (5th Cir. 1992); United States v. Truss, 4 F.3d 437, 441 (6th Cir. 1993); United States v. McGee, 981 F.2d 271, 274-276 (7th Cir. 1992); United States v. Behnezhad, 907 F.2d 896, 898-899 (9th Cir. 1990); United States v. Rockwell, 984 F.2d 1112, 1116-1117 (10th Cir.), cert. denied, 508 U.S. 966 (1993); United States v. Tatum, 998 F.2d 893, 895-896 (11th Cir. 1993).

violated the terms of his supervised release -- Congress enacted 18 U.S.C. 3583(h). Pub. L. No. 103-322, Tit. XI, § 110505(3), 108 Stat. 2017. Section 3583(h) made clear that, when a defendant's term of supervised release is revoked and he is ordered to serve a term of reimprisonment, the district court may also order the offender to serve a term of supervised release after his release from reimprisonment. Section 3583(h) expressly authorizes a new term of supervised release, as long as the term of reimprisonment is less than the maximum authorized upon revocation, and as long as the combination of the period of reimprisonment and the period of supervised release does not exceed in duration the maximum term of supervised release authorized for the original offense. 18 U.S.C. 3583(h). For these purposes, the offender is not entitled to any credit for the time he spent on supervised release before it was revoked. See 18 U.S.C. 3583(e)(3) and (h).[3]

---

[3] Section 3583(h) provides in full:

> When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term of imprisonment authorized under subsection (e)(3), the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

Section 3583(e)(3) provides that, upon finding a violation of a condition of supervised release, a district court may

> revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release * * * without credit for time previously served on postrelease supervision, * * * except that a defendant whose term is revoked under this paragraph may not be required to serve more than 5 years if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense was a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case.

3. Petitioner appealed the revocation of his supervised release, contending that the application of Section 3583(h) to his case violated the Ex Post Facto Clause. The court of appeals affirmed in an unpublished order. Pet. App. A1-A2. Relying on circuit precedent, United States v. Abbington, 144 F.3d 1003, 1005 (6th Cir.), cert. denied, 119 S. Ct. 344 (1998); United States v. Page, 131 F.3d 1173 (6th Cir.), cert. denied, 119 S. Ct. 77 (1998), the court held that the violation of a condition of supervised release is a separate prohibited act, and that punishment for that violation does not implicate the Ex Post Facto Clause if the violation occurred after the amendment to Section 3583(h). Pet. App. A2.

ARGUMENT

Petitioner urges (Pet. 5-10) this Court to decide whether, in a case in which a defendant committed his underlying offense before the enactment of 18 U.S.C. 3583(h), a court may, upon revocation of supervised release, lawfully impose under that

provision a renewed term of supervised release after reimprisonment. The Court has recently denied review on the same issue in nine cases, including five earlier cases that were decided in the circuit in which this case arose (and on which the lower court relied in this case). See Ledford v. United States, 119 S. Ct. 1360 (1999); Smith v. United States, 119 S. Ct. 1117 (1999); Abbington v. United States, 119 S. Ct. 344 (1998); Grubbs v. United States, 119 S. Ct. 80 (1998); Page v. United States, 119 S. Ct. 77 (1998); see also Shorty v. United States, 119 S.Ct. 2024 (1999); Withers v. United States, 119 S. Ct. 79 (1998); Brown v. United States, 522 U.S. 1120 (1998); Brady v. United States, 519 U.S. 1094 (1997).[4] There is no basis in this case for a different result. Petitioner may in fact have benefitted from the application of Section 3583(h) to his case because, on the revocation of his supervised release, the district court ordered him to serve a term of reimprisonment that was shorter than the maximum term that he could have been ordered to serve under prior law. In any event, the issue has only limited prospective significance. This Court's review is therefore not warranted.

1. An ex post facto issue would arise in a case like this by virtue of the application of Section 3583(h) only if that enactment changed the law in a way that was onerous to

[4] The same issue is also presented in Davis v. United States, petition for cert. pending, No. 98-9402.

petitioner. The court of appeals decided this case (and the prior ones, like Abbington, on which it relied) on the assumption that Section 3583(h) changed the law because it took the view that, before Section 3583(h) was enacted, the law did not permit a court, upon revocation of a term of supervised release, to impose a term of imprisonment to be followed by a renewed term of supervised release. See United States v. Truss, 4 F.3d 437, 441 (6th Cir. 1993). That understanding of the prior law is incorrect. Before Section 3583(h) was enacted, a district court was authorized to "revoke a term of supervised release, and require the person to serve in prison all or part of the term of supervised release without credit for time previously served on postrelease supervision." 18 U.S.C. 3583(e)(3) (1988 ed., Supp. IV 1992). Thus, a district court, upon revoking supervised release, was authorized to impose a term of reimprisonment equal in length to the term of supervised release originally imposed. That statutory power is most naturally understood to include the lesser power to impose a punishment that combines, for a period of equal or lesser duration, both prison and supervised release. See United States v. Schrader, 973 F.2d 623, 625 (8th Cir. 1992); accord United States v. O'Neil, 11 F.3d 292, 296-297 (1st Cir. 1993).

Before Section 3583(h) was enacted, some courts of appeals interpreted Section 3583(e) to prohibit a district court from including a period of supervised release following

reimprisonment. See note 2, supra. This Court never decided that issue. The enactment of Section 3583(h) resolved the disagreement among the circuits on that question by expressly empowering sentencing courts, upon revocation of supervised release, to impose a combined term of imprisonment and renewed supervised release. As we have explained, subsection (h) reaffirmed a power that already existed under prior law. An ex post facto problem, therefore, could not arise solely from the fact that the district court ordered petitioner to serve a new term of supervised release following his term of reimprisonment.

2. Although petitioner challenges the sentencing court's reliance on Section 3583(h), he may have benefitted from its application to his case. Under the statutory provisions governing supervised release at the time of petitioner's offense, a district court was authorized to impose two years' reimprisonment following revocation of supervised release because petitioner's underlying credit-card conspiracy offense was a Class D felony. See note 1, supra; 18 U.S.C. 3583(e)(3) (providing for up to two years' reimprisonment after revocation of supervised release when the underlying offense is a Class D felony). In the circuits that had denied courts the power to reimpose supervised release after the term of reimprisonment, the new law gave the district court the flexibility to order offenders to serve a lesser term of reimprisonment, followed by a period of supervised release. After his original term of

supervised release was revoked, petitioner was ordered to serve only 18 months' reimprisonment, followed by further supervised release. The option afforded under Section 3583(h) for the district court to order offenders like petitioner to serve shorter terms in prison to be followed by supervised release, rather than potentially lengthier terms of prison alone, reduces any ex post facto concerns in the application of Section 3583(h). Cf. Dobbert v. Florida, 432 U.S. 282, 292, 296 (1977) (rejecting contention that change from jury-sentencing to judge-sentencing procedure was an ex post facto violation because "the changes in the law are * * * on the whole ameliorative," and "the totality of the procedural changes wrought by the new statute * * * did not work an onerous application of an ex post facto change in the law"); United States v. Withers, 128 F.3d 1167, 1172 (7th Cir. 1997) (relying on Dobbert in observing that Section 3583(h) has an "ameliorative" effect in enabling district court to impose relatively shorter terms of reimprisonment "because of its ability to impose a renewed term of supervised release following" the term of reimprisonment rather than simply imposing a longer prison term), cert. denied, 119 S. Ct. 79 (1998).[5]

---

[5] The court in Withers overruled United States v. Beals, 87 F.3d 854 (7th Cir. 1996), to which petitioner refers (Pet. 6). The panel in Beals believed that the possibility of sequential revocations of supervised release and successive terms of reimprisonment under Section 3583(h) created a disadvantage for purposes of the ex post facto analysis. As Withers correctly recognized, however, such speculative future consequences, preventable by the defendant, do not rise to the level of

3. Petitioner argues that the decision below conflicts with decisions of other circuits that have concluded that the application of Section 3583(h) to offenders whose offenses were committed before the enactment of that statute violated the Ex Post Facto Clause. See Pet. 8-9. There is a divergence of views between the decision below and the decisions of other circuits. Compare Pet. App. A1-A2 (decision below) and United States v. Withers, 128 F.3d 1167 (7th Cir. 1997), cert. denied, 119 S. Ct. 79 (1998), with United States v. Lominac, 144 F.3d 1003 (4th Cir. 1998), United States v. Dozier, 119 F.3d 239 (3d Cir. 1997), and United States v. Collins, 118 F.3d 1394 (9th Cir. 1997).[6] The issue is of limited prospective significance, however, because it has relevance only to those offenders who committed their

---

increased punishment under California Department of Corrections v. Morales, 514 U.S. 499 (1995). See Withers, 128 F.3d at 1171-1172.

[6] Petitioner also suggests (Pet. 8-9) that the decision below conflicts with other decisions of the Second, Fourth, and Ninth Circuits concerning the ex post facto significance of the revocation of supervised release and imposition of terms of reimprisonment. Those decisions, however, concerned the application of 18 U.S.C. 3583(g) (1988), which at one time required, following revocation of supervised release for certain reasons, the imposition of mandatory minimum terms of reimprisonment of one-third of the term of supervised release. Section 3583(g) was completely revised in 1994, see Pub. L. No. 103-322, tit. XI, § 110505, 109 Stat. 2016, and, although it still requires revocation of supervised release in certain circumstances, it no longer requires the mandatory minimum reimprisonment term of one-third the term of supervised release. See 18 U.S.C. 3583(g) (1994 & Supp. III 1997). The decisions addressing the ex post facto implications of former Section 3583(g), therefore, have no continuing significance.

underlying offenses between November 1, 1987 (when the use of supervised release commenced under the Sentencing Guidelines), and September 13, 1994 (when Section 3583(h) became effective). The number of offenders potentially affected by the question presented here is therefore fixed. As we have also noted (page 6, supra), this Court already has denied review of the same question several times.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

JAMES K. ROBINSON
Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney

SEPTEMBER 1999

99-5153

Supreme Court, U.S.
FILED
1999
OFFICE OF THE CLERK

ORIGINAL

NO. 98-5664

IN THE UNITED STATES SUPREME COURT

OCTOBER 1998 TERM

UNITED STATES OF AMERICA,

Respondent,

V.

CORNELL JOHNSON,

Petitioner.

MOTION TO PROCEED IN FORMA PAUPERIS

RITA LaLUMIA
Assistant Federal Community Defender
FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.
707 Georgia Avenue, Suite 203
Chattanooga, Tennessee 37402
(423) 756-4349

Counsel for Petitioner

RECEIVED
1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

JOHNSON, CORNELL
Petitioner

vs.

USA

No. 99-5153

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by first class mail, postage prepaid, on this 17th day of September 1999.

RITA LALUMIA
ASSISTANT FEDERAL COMMUNITY DEFENDER
707 GEORGIA AVENUE, SUITE 203
CHATTANOOGA, TN 37402

Seth P Waxman/ms

SETH P. WAXMAN
Solicitor General
Counsel of Record

September 17, 1999

RECEIVED
HAND DELIVERED
SEP 17 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

RECEIVED
SUPREME COURT, U.S.
OFFICE OF THE CLERK
1999 SEP 17 P 2:26

FILED
NOV 12 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 99-5153

In The

Supreme Court of the United States

CORNELL JOHNSON,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

JOINT APPENDIX

LEAH J. PREWITT
*RITA C. LALUMIA
DAVID F. NESS
Federal Defender Services of Eastern Tennessee, Inc.
707 Georgia Avenue, Suite 203
Chattanooga, TN 37402
Telephone: (423) 756-4349
Fax: (423) 756-4345
Counsel for Petitioner

*SETH P. WAXMAN
Solicitor General
Department of Justice
Washington, DC 20530
Telephone: (202) 514-2217
Fax: (202) 514-2255
Counsel for Respondent

**Counsel of Record*

Petition For Certiorari Filed July 2, 1999
Certiorari Granted October 18, 1999

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

52 pp

TABLE OF CONTENTS

Page

Relevant Docket Entries 1

Indictment 2

Plea Agreement 4

Judgment and Commitment 7

Petition for Warrant Or Summons for Offender Under Supervision 17

Hearing on Revocation Proceedings, April 30, 1998, (Tr. pp.1-10) 21

Dispositional Report 30

Judgment for Revocation of Supervised Release 38

Order Affirming District Court's Judgment of the United States Court of Appeals for the Sixth Circuit, April 29, 1999 48

Order of the Supreme Court of the United States granting certiorari and leave to proceed in forma pauperis, October 18, 1999 50

RELEVANT DOCKET ENTRIES

Date	Proceedings
1993	
Oct. 26	Indictment filed
Dec. 15	Plea Agreement filed
1994	
March 8	Judgment and Commitment
1998	
March 5	Petition for Warrant or Summons for Offender Under Supervision
April 30	Supervised Release Revocation Hearing
April 30	Dispositional Report filed
May 1	Judgment for Revocation of Supervised Release
May 5	Notice of Appeal by Defendant filed
1999	
April 29	Order Judgment of the United States Court of Appeals for the Sixth Circuit Affirming the District Court's Judgment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

UNITED STATES OF AMERICA	)	**CR-1-93-138**
V.	)	**Edgar**
SEAN ANTHONY JESSIE; CORNELL JOHNSON; and BRICE WILLIAM MYLES	)	

INDICTMENT

(Filed Oct. 26, 1993)

COUNT ONE

The Grand Jury charges that on or about October 22, 1993, in the Eastern District of Tennessee and elsewhere, the defendants, SEAN ANTHONY JESSIE, CORNELL JOHNSON, and BRICE WILLLIAM MYLES, did conspire with each other and others to the Grand Jury unknown, to commit an offense under 18 U.S.C. § 1029(a), that is, the defendants did knowingly and with intent to defraud produce, use and traffic in one or more counterfeit access devices, which conduct affected interstate commerce, and did engage in conduct in furtherance of that offense; all in violation of 18 U.S.C. 1029(b)(2).

COUNT TWO

The Grand Jury further charges that on or about October 22, 1993, in the Eastern District of Tennessee and elsewhere, the defendants, SEAN ANTHONY JESSIE,

CORNELL JOHNSON, and BRICE WILLLIAM MYLES, knowingly and with intent to defraud attempted to produce, use and traffic in one or more counterfeit access devices, which conduct affected interstate commerce, in violation of 18 U.S.C. 1029(a)(1); all in violation of 18 U.S.C. § 1029(b)(1).

A TRUE BILL:

/s/ Rebecca Illegible
GRAND JURY FOREMAN

/s/ Carl K. Kirkpatrick
CARL K. KIRKPATRICK
United States Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

UNITED STATES OF AMERICA	)	**CR-1-93-138**
V.	)	
CORNELL JOHNSON	)	

PLEA AGREEMENT

(Filed Dec. 15, 1993)

Pursuant to Rule 11 of the Federal Rules of Criminal Procedure, the United States of America, by Carl K. Kirkpatrick, United States Attorney for the Eastern District of Tennessee, and the defendant, CORNELL JOHNSON, and his attorney, C. Leland Davis, have agreed upon the following:

The defendant will plead guilty to Count One of the indictment, charging him with a violation of 18 U.S.C. § 1029.

Pursuant to Rule 11(e)(1)(A), Federal Rules of Criminal Procedure, the United States agrees that it will move the court at the time of sentencing to dismiss Count Two.

Pursuant to Rule 11(e)(1)(C), Federal Rules of Criminal Procedure, the parties agree that the appropriate disposition of this case would be a sentence within the lower one-third of the applicable sentencing guideline range as to any fine and imprisonment.

The defendant agrees to make full and complete restitution to any victims in this case in such amounts and in such manner as the court may determine.

The special assessment of $50 per count shall be paid no later than the day of the plea proceeding.

The defendant acknowledges that he understands that his case is governed by the sentencing guidelines, and that he has discussed the guidelines with his attorney. In consideration of the United States' acceptance of this agreement, the defendant expressly waives the right to appeal his conviction or sentence on any ground, including any appeal right conferred by 18 U.S.C. § 3742. The defendant further agrees not to file any motions or pleadings pursuant to 28 U.S.C. § 2255. Thus, the defendant knowingly, intentionally, and voluntarily waives his right to collaterally attack the plea being offered in the instant case. The defendant further acknowledges that a breach of this clause of the plea agreement (like the defendant's breach of any other clause of the plea agreement) would leave the United States free to withdraw from the plea agreement.

Based upon the evidence presently available to the parties, the parties view this case as one where the defendant has accepted responsibility for his involvement in this offense.

Should the defendant withdraw from this plea agreement for any reason, any statement made by the defendant subsequent to his signing this plea agreement may be used for any purpose by the United States.

By his signature to this agreement, the defendant acknowledges that he has discussed with his attorney each provision of this agreement and understands the potential consequences of each provision of this agreement.

The parties further agree that this plea agreement constitutes the full and complete agreement and understanding between the parties concerning the defendant's guilty plea to the above-referenced charge, and that there are no other agreements, promises, undertakings, or understandings between the defendant and the United States.

CARL K. KIRKPATRICK
United States Attorney

/s/ Gary S. Humble
Gary S. Humble
Assistant U.S. Attorney

/s/ **Cornell Johnson** 11/30/93
Cornell Johnson Date
Defendant

/s/ **C. Leland Davis** 11/30/93
C. Leland Davis Date
Attorney for Defendant

UNITED STATES DISTRICT COURT
EASTERN District of TENNESSEE

UNITED STATES OF AMERICA

V.

CORNELL JOHNSON

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

(Filed Mar. 8, 1994)

Case Number:
CR-1-93-00138-002

C. Leland Davis, c/o
District Attorney's Office
600 Market Street
Chattanooga, TN 37402
Appointed Counsel
Defendant's Attorney

THE DEFENDANT:

[X] pleaded guilty to count~~(s)~~ One (1) of the Indictment
[ ] was found guilty on count(s) _____
after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Numbers
18: 1029(b)(2)	Did conspire to commit an offense under 18 USC Section 1029(a), that is, knowingly with intent to defraud produce, use and traffic in one or more counterfeit access devices, which conduct affected interstate commerce, and did engage in conduct in furtherance of that offense.	Oct. 22, 1993	Count One (1)

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

[X] Count~~(s)~~ Two (2) (is)(~~are~~) dismissed on the motion of the United States.

[X] It is ordered that the defendant shall pay a special assessment of $50.00, for count(s) One (1) of the Indictment, which shall be due [X] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 250-04-0337

Defendant's Date of Birth: May 9, 1954

Defendant's Mailing Address:
1762 N. Springdale Place
Florence, SC 29506

Defendant's Residence Address:
1762 N. Springdale Place
Florence, SC 29506

Monday, February 28, 1994
Date of Imposition of Sentence

/s/ R. Allan Edgar
Signature of Judicial Officer

R. ALLAN EDGAR,
UNITED STATES DISTRICT JUDGE
Name & Title of Judicial Officer

3/8/94
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Twenty-five (25) months upon Count One (1) of the Indictment.

[ ] The court makes the following recommendations to the Bureau of Prisons:

[X] The defendant is remanded to the custody of the United States marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.

[ ] at ___ a.m./p.m. on ___.
[ ] as notified by the United States marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

[ ] before 2 p.m. on _____.
[ ] as notified by the United States marshal.
[ ] as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____
_____
_____
_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Three (3) years upon Count One (1) of the Indictment.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of

supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[X] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

[X] The defendant shall pay any ~~fines~~/restitution that remain unpaid at the commencement of the term of supervised release.

[X] The defendant shall not possess a firearm or destructive device.

The defendant shall provide the probation officer with access to any requested financial information.

The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the installment payment schedule.

The defendant shall participate in a program of testing and/or treatment for drug and/or alcohol abuse, as directed by the probation officer, until such time as he is released from the program by the probation officer.

The defendant shall participate in a program of mental health treatment as directed by the probation officer, until such time as he is released from the program by the probation officer.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

RESTITUTION AND FORFEITURE

RESTITUTION

[X] The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution
Food Lion, Incorporated Attn: Check Recovery P. O. Box 1549 Salisbury, NC 28145-1549	$ 663.96
Western Union Attn: Ruth Williams Western Union Financial Services 13022-A Hollenberg Drive Bridgeton, MO 63044	$3,000.00
TOTAL	$3,663.96

Any payment made that is not payment in full shall be divided proportionately among the payees named above.

Payments of restitution are to be made to:

[ ] the United States Attorney for transfer to the payee(s).

[X] the payee(s), through the office of the U. S. District Court Clerk

Restitution shall be paid:

[X] in full immediately.

[ ] in full not later than _____.

[ ] in equal monthly installments over a period of ___ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.

[ ] in installments according to the following schedule of payments:

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

FORFEITURE

[ ] The defendant is ordered to forfeit the following property to the United States:

STATEMENT OF REASONS

[X] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 11

Criminal History Category: V

Imprisonment Range: 24 to 30 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 2,000.00 to $ 20,000.00

[X] Fine is waived or is below the guideline range because of the defendant's inability to pay.

Restitution: $ 3,663.96

[ ] Full restitution is not ordered for the following reason(s):

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range.

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

* * *

United States District Court

for

Eastern District of Tennessee

Petition for Warrant or Summons for Offender Under Supervision

(Filed Mar. 5, 1998)

Case Number: CR-1-93-138-002

Name of Offender: Cornell Johnson

Name of Sentencing Judicial Officer: Honorable R. Allan Edgar

Date of Original Sentence: 02/28/94

Original Offense: Conspiracy to Produce, Use and Traffic in Counterfeit Access Devices in violation of Title 18 U.S.S.C. § 1029(b)(2)

Class: D Felony Criminal History Category: V

Original Sentence: Twenty-five month term of incarceration to be followed by a three year term of supervised release with the conditions that 1) The defendant pay restitution in the amount of $663.96 to Food Lion, Inc. of Salisbury, N.C. and $3000 to Western Union of Bridgeton, MO, for a total of $3663.96, 2) The defendant provide the probation officer with access to any requested financial information, 3) The defendant not incur any new lines of credit or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the installment payment schedule, 4) The defendant participate in a program of testing and/or drug treatment as directed by the probation officer, until such time as he is released from the program by the

probation officer, 5) The defendant participate in a program of mental health treatment as directed by the probation officer, until such time as he is released from the program by the probation officer.

Type of Supervision: Supervised Release

Date Supervision Commenced:	Date Supervision Expires:
08/14/95	08/13/98

Assistant U.S. Attorney:	Defense Attorney:
Gary Humble	C. Leland Davis

PETITIONING THE COURT

[X] To issue a warrant
[ ] To issue a summons

The probation officer believes that the offender has violated the following condition(s) of supervision:

Violation Number	Nature of Noncompliance
I	**VIOLATION OF GENERAL CONDITIONS OF SUPERVISION**: The defendant shall not commit another federal, state or local crime.

According to U.S. Probation Officer, Joe Barton, Atlanta, Georgia, Mr. Cornell Johnson was arrested on 03/03/96, by the Newport News, Virginia Police Department and charged with three counts of Forgery and three counts of Uttering a Forged Instrument in violation of Virginia State Code § 18.2-172, after attempting to pass a counterfeit payroll check, using a ficticious [sic] name and identification card issued by the State of Virginia, to a Food

Lion food store, located in Newport News. This constitutes a violation of the offender's conditions of supervised release.

According to Detective Linda Spruill, of the Newport News, Virginia Police Department, Johnson is now being held in the Newport News city jail without bond.

II	**VIOLATION OF STANDARD CONDITION #1**: The defendant shall not leave the judicial district without the permission of the Court or probation officer.

Cornell Johnson traveled outside the Northern District of Georgia, which is the district of supervision at this time, without written travel authorization from the probation office. This unauthorized travel is evidenced by Johnson's arrest in Newport News, Virginia on March 3, 1996, for Forgery and Uttering a Forged Instrument.

U.S. Probation Officer Recommendation: That a warrant be issued and the defendant be ordered to appear in court, before Honorable R. Allan Edgar for a hearing to determine whether the term of supervision should be revoked.

Respectfully submitted by,

/s/ Don Johnson
Donald E. Johnson
U.S. Probation Officer
Date: March 5, 1996

APPROVED BY:

/s/ Leslie A. Cory 3-5-96
Leslie A. Cory, Date:
Supervising U.S. Probation Officer

ORDER OF COURT:

A warrant is to be issued and the defendant is ordered to appear in Court for a hearing to determine whether the term of supervision should be revoked.

So ordered.

ENTER.

/s/ John Y. Powers
The Honorable John Y. Powers

3-5-96
Date

[p. 1] IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

AT CHATTANOOGA

UNITED STATES OF AMERICA, Plaintiff, -versus- CORNELL JOHNSON, Defendant.	:	CR-1-93-138 (Filed May 18, 1998)

Chattanooga, Tennessee
April 30, 1998

BEFORE: THE HONORABLE R. ALLAN EDGAR
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

JOHN MacCOON, ESQ.,
Assistant United States Attorney
1110 Market Street, Suite 301
Chattanooga, Tennessee 37402

FOR THE DEFENDANT:

PERRY H. PIPER, ESQ.,
Federal Defender Services
Flatiron Building, Suite 203
Chattanooga, Tennessee 37402

REVOCATION HEARING
VOLUME I
PAGES 1 through 10

[p. 2] THE CLERK: Criminal Action 1-93-138, United States of America versus Cornell Johnson.

THE COURT: Okay. Mr. Johnson, it's been alleged here that you have violated the terms of your supervised release and there is a petition to revoke that supervised release before the Court. Are you aware of that?

THE DEFENDANT: Yes, sir.

THE COURT: And it's charged here that you have violated the condition of your supervised release which provides that you shall not commit another federal, state or local crime. And it's also alleged that you violated the condition you should not leave the judicial district without the permission of the Court or the applicable probation officer. And, essentially, as I understand it, the allegation is that you left, I think you were being supervised in Georgia at the time in Georgia, and you left there and went up to Virginia and committed some criminal offenses of which you were convicted. That's what the allegation is.

Mr. Piper, I guess I'll ask you first what your client's position is with respect to whether or not he has violated the terms of his supervised release?

MR. PIPER: We admit as to both violations, Judge.

THE COURT: Okay. Is that correct, Mr. Johnson?

THE DEFENDANT: Yes, sir.

[p. 3] THE COURT: Okay. The next question then becomes what is to be done about it. The policy statement I think in the case are 18 to 24 months. Did you want to respond to that?

MR. PIPER: Thank you, Judge. I do think the statutory maximum is also 24 months as well.

THE COURT: I think that's right.

MR. PIPER: Class D felony. Your Honor, I've had about three opportunities to speak with Mr. Johnson since he was brought in last week. He's a very bright man. He has a bachelor's degree I think from South Carolina, is that correct?

THE DEFENDANT: Yes.

MR. PIPER: University of. I think his intentions have always been to go straight here. I don't know what little glitch caught up with him, what little bump in the road caught up with him, made him go to Newport News, Virginia and do these things. He is genuinely sorry that he did, not just for the fact that he got caught. He intends, whatever happens here today, he knows he's going to get time, and he intends to go straight once he does get out of here. He's had previous difficulties with the law and legal system. As I stated, Mr. Johnson has a desire and the flesh is willing and I hope the will is there to get out and go straight and get a job, further his education.

[p. 4] THE COURT: Mr. Johnson, is there anything that you want to say to the Court?

THE DEFENDANT: Yes, sir. Your Honor, you know, I regret the choices that I made which have brought me here today. And when I got out of prison the last time I was very optimistic, Your Honor, very optimistic about going back into the community, gaining stable employment and getting on with my life. As a matter of fact, while I was in the halfway house, I took a test with the civil service, state civil service office in Georgia and I scored a 95 on the senior caseworker exam. And I was interviewed for the job after I left the halfway house and a week after my interview I was offered the position and they called my probation officer and told him that I had been offered a position in Augusta and I would have to transfer and I was all excited.

And, I mean, he's not here to defend himself and I'm not saying it's his fault that I got in trouble, you know, I could never say that because that would be irresponsible and that would be passing the buck per se, but I called him and told him and he contacted the Department of Family and Children Services in Augusta and he went into my criminal past. And, of course, I went into my criminal past but not indepth during the interview. And, of course, they called me back and subsequently said they had to withdraw the offer.

[p. 5] And, you know, needless to say I felt crushed, and I was devastated, but I can't blame him for that. And, of course, being arrested in Virginia and doing time there, I mean, I regret all of that and I'm truly sorry for what I did, but I look forward to the future also. I've already started making plans to reenter graduate school once I'm released from prison, what I plan is while I'm working in Unicorp in prison, if I get to a halfway house, save money

there enough to get my foot in the door to pursue a master's degree in rehabilitation counseling at the University of South Carolina. If I weren't standing here today, I would still, I still plan to do that regardless of what happens today, nothing is going to stop me from doing that. I'm passionate about it. It's something I really want to do and it's something I can feel myself doing sincerely. That's all I've got to say.

THE COURT: Mr. MacCoon.

MR. MacCOON: Nothing to add, Your Honor. Thank you.

THE COURT: Mr. Johnson, I remember you were here the last time and I was optimistic at that time because you are an intelligent person. You've got some ability. But for some reason you keep doing the same type of criminal offense. I mean, you've had a previous, now, two previous federal convictions in addition to numerous state convictions, and of [p. 6] course, you do have some restitution yet to pay as a result of this offense, the offense that you were convicted here of originally which, you know, you're going to have to pay. I hope you can go to graduate school, and I'm all for that, I encourage you to do that, but, unfortunately, you do have a few obligations to meet too as well. We're faced here with, of course, there is a need, at least a short one, to protect the public from the kind of activity that you have engaged in. I certainly hope that you will be able to keep this, keep from doing this in the future and surely you can see that this is a dead end street.

THE DEFENDANT: Yes, sir.

THE COURT: But, anyway, pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant's supervised release is revoked and the defendant, Cornell Johnson, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 18 months.

It is further ordered that the defendant shall pay restitution, and I recognize you did pay some restitution.

THE DEFENDANT: Yes, sir, I did the best I could, Your Honor.

THE COURT: You did pay some of it, but not all of it.

THE DEFENDANT: Minimum wage jobs, I did the best I could.

[p. 7] THE COURT: Right. Restitution amount $286.96 to Food Lion, Incorporated, and 3,000 to Western Union of Bridgeton, Missouri for a total of $3,286.96. This figure represents the balance due on the restitution originally ordered in Case No. 1-93-CR-138. The restitution shall be paid in full immediately through the United States District Court.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 12 months. Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district to which you're released. Within 72 hours, you understand?

THE DEFENDANT: Yes, sir.

THE COURT: While on supervised release, the defendant shall not commit another federal, state, or local crime, shall comply with all the standard conditions that have been adopted by this Court in its Local Rule 83.10, and shall not illegally possess a controlled substance.

The defendant shall not possess a firearm as defined in 18 U.S.C. 921.

There are some other special conditions of supervised release, drug testing, substance abuse testing at the discretion of the probation officer, a program of mental health treatment as directed by the probation officer. [p. 8] Paying your restitution. Access to any requested financial information by the probation officer.

And you would not open any new lines of credit or obtain any credit without the approval of the probation officer.

Any questions?

MR. PIPER: Judge, Mr. Johnson and I obviously discussed once again the supervised release issue. I would ask that the dispositional report be made a part of the record and would note his original sentence as reflected in the dispositional report is February 28th of '94. It's a Class D felony. And I do believe Mr. Johnson, and I discussed it with him yesterday, obviously, about the ex post facto issue, and I would certainly hope that the Supreme Court would decide this issue one of these days.

THE COURT: Are you appealing all of these?

MR. PIPER: Unfortunately the last two I've sent up have been very short briefs, mine are generally short anyway. I feel like I have an obligation to do it, Judge.

THE COURT: Even though the law in the circuit is clearly to the contrary?

MR. PIPER: Ms. Prewitt and I had a discussion about that recently and I question whether or not I should continue to do it, she believes that I should, so . . .

THE COURT: Okay. I mean, that's fine.

[p. 9] MR. PIPER: We would ask –

THE COURT: I thought you all had something better to do over there.

MR. PIPER: I have plenty more better to do. I have plenty much to do, and I agree, but we would ask the dispositional report be made a part of the record, Your Honor, and raise that objection to the ex post facto issue.

THE COURT: The dispositional report to be made a part of the record?

MR. PIPER: For appeal, yes, sir. And the reason why I ask for that is because the 6th Circuit, it's generally not a part of the record on appeal, and that's the way that I can get into evidence the fact that his conviction –

THE COURT: Okay.

MR. PIPER: Thank you.

THE COURT: It's part of the record, so ordered, let it be done. If you want to appeal this, Mr. Johnson, we

were just talking about that here, if you want to appeal this, you can do so, discuss it with Mr. Piper, and a notice of appeal has to be filed within 10 days to start that process.

All right. Anything else? Okay. We'll be in recess until 10 o'clock.

MR. PIPER: Thank you.

END OF REVOCATION HEARING

[p. 10] I, Shannan Andrews, do hereby certify that I reported in machine shorthand the proceedings in the above-styled cause held April 30, 1998, and that this transcript is an accurate record of said proceedings.

/s/ Shannan Andrews
Shannan Andrews
Official Court Reporter

U.S. Probation Office

United States District Court
for the Eastern District of Tennessee

DISPOSITIONAL REPORT

Name of Offender: Cornell Johnson
Case Number: CR-1:93-138-002

Name of Sentencing Judicial Officer: Honorable R. Allan Edgar

Date of Original Sentence: 02/28/94

Original Offense: Conspiracy to Produce, Use, and Traffic in Counterfeit Access Devices in violation of Title 18 U.S.C. § 1029(b)(2)

Class: D Felony

Criminal History Category: V

Original Sentence: Twenty-five month term of incarceration to be followed by a three year term of supervised release with the following conditions: (1) The defendant shall pay restitution in the amount of $663.96 to Food Lion, Inc. of Salisbury, N.C., and $3,000 to Western Union of Bridgeton, MO, for a total of $3663.96; (2) The defendant shall provide the probation officer with access to any requested financial information; (3) The defendant shall not incur any new lines of credit or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the installment payment schedule; (4) The defendant shall participate in a program of testing and/or drug treatment as directed by the probation officer; (5) The defendant

shall participate in a program of mental health treatment as directed by the probation officer.

Type of Supervision: Supervised Release

Date Supervision Commenced: 8/14/95

Date Supervision Expires: 08/13/98

Assistant U.S. Attorney: Gary Humble

Defense Attorney: Perry Piper

Violation Number	Nature of Noncompliance
I	***VIOLATION OF GENERAL CONDITIONS OF SUPERVISION***: The defendant shall not commit another federal, state, or local crime.
II	***VIOLATION OF STANDARD CONDITION #1***: The defendant shall not leave the judicial district without the permission of the Court or probation officer.

STATUTORY PROVISIONS: Title 18 U.S.C. § 3583(e)(3) provides that the court may revoke a term of supervised release and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on post release supervision, if it finds by a preponderance of the evidence that the defendant violated a condition of supervised release.

The defendant was originally convicted of a Class D felony, therefore, upon revocation the court may not impose a sentence of imprisonment greater than two years. Also, pursuant to 18 U.S.C. § 3583(h), and the 1997

Sixth Circuit ruling in *U.S. v. Page*, 96-4329, the court may reimpose supervised release after revocation, even in cases in which the original crime occurred prior to enactment of 18 U.S.C. § 3583(h), provided that any term of imprisonment that the defendant is ordered to serve is less than the maximum term of imprisonment authorized by statute under 18 U.S.C. § 3583(e)(3). If supervised release is reimposed in this case the statute sets a maximum term of 3 years.

POLICY STATEMENT/GUIDELINE PROVISIONS: Mr. Johnson's violations consist of Grade B violations as defined in U.S.S.G. Pursuant to 7B1.3(a)(1), upon a finding of a Grade B violation, the court shall revoke supervised release.

With a Criminal History Category of V and Grade B violations, in accordance with U.S.S.G. § 7B1.4(a), Mr. Johnson's range of imprisonment is 18-24 months.

U.S.S.G. § 7B1.3 provides that where supervised release is revoked and the term of imprisonment imposed is less than the maximum term of imprisonment imposable upon revocation, the court may include a requirement that the defendant be placed on a term of supervised release upon release from imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

Pursuant to U.S.S.G. § 7B1.3(d) any restitution previously imposed in connection with the sentence for which revocation is ordered that remains unpaid shall be

ordered to be paid in addition to the sanctions determined under § 7B1.4 (Term of Imprisonment). The offender has an outstanding restitution balance of $3,286.96.

HISTORY OF SUPERVISION/COMPLIANCE WITH CONDITIONS: Mr. Johnson's supervision term commenced on August 18, 1995. He was on supervision for only seven months before violating the conditions of his supervision by engaging in criminal conduct which subsequently resulted in his being convicted on new felony and misdemeanor charges, and being sentenced to a term of imprisonment in Virginia. Additionally, Mr. Johnson traveled outside the jurisdiction of his supervision without the permission of his probation officer as is evidenced by his arrest in March 1996 in Newport News, Virginia.

Prior to the above-cited violations, the offender appeared to be in compliance with his supervision conditions, including his monthly restitution payment schedule of $50. He did, however, experience some difficulty maintaining steady, stable employment.

COURT ACTION TO DATE:

Mr. Johnson was arrested in March 1996, in Newport News, Virginia on a total of ten counts of Fraud and Uttering charges. He was convicted in the Circuit Court of Newport News, Virginia on July 25, 1996 for the offenses of Forgery (Docket No. 33726-96), and Uttering (Docket No. 33725-96). He was sentenced to a ten year term of imprisonment for each law violation. The court suspended the execution of nine years of his sentence for

the offense of Forgery and nine and one-half years for the offense of Uttering.

The offender was also convicted on July 26, 1996 in the Newport News General District Court for the offenses of Obtaining Money by False Pretense (Docket No. 96-005237), and Larceny by False Pretense (Docket No. 96-005239). He was sentenced to serve a 12-month jail term on each charge. The remaining criminal charges against the offender in Newport News, Virginia were nolle prosequi.

The offender was in the custody of the State of Virginia until his release to the supervised release detainer on March 31, 1998. A removal hearing was held in Newport News that date, at which time the Court ordered that Mr. Johnson be returned to the Eastern District of Tennessee to answer to the charge of violating his conditions of supervised release.

On April 24, 1998, the offender appeared before Magistrate John Y. Powers in the Eastern District of Tennessee for a preliminary hearing at which time he was ordered to be detained pending a revocation hearing. Mr. Johnson is scheduled to appear for a revocation hearing on May 30, 1998 at 9:30 a.m. before U.S. District court Judge R. Allan Edgar.

Respectfully submitted,

/s/ Angela W. Hayes
Angela W. Hayes
U.S. Probation Officer

APPROVED:

/s/ Leslie A. Cory 4/28/98
Leslie A. Cory Date
Supervising U.S. Probation Officer

VIOLATION WORKSHEET

1. DEFENDANT

Cornell Johnson

2. DOCKET NUMBER (Yr/Sequence Def. No.)

cr-1-93-138-002

3. DISTRICT/OFFICE

Eastern District of Tennessee – Chattanooga

4. ORIGINAL SENTENCE DATE

02/28/94

(if different from above):

5. ORIGINAL DISTRICT/OFFICE

Eastern District of Tennessee – Chattanooga

6. ORIGINAL DOCKET NUMBER (Yr/Sequence Def. No.)

Same

7. **List each violation and determine the applicable grade** (*See* 7B1.1):

	Violations	Grade
1.	The defendant shall not commit another federal, state, or local crime.	B

2. The defendant shall not leave the judicial district without the permission of the Court or probation officer. C

8. **Most Serious Grade of Violation** (*See* 7B1.1(b)): B

9. **Criminal History Category** (*See* 7B1.4(a)): V

10. **Range of Imprisonment** (*See* 7B1.4(a)): 18-24 months

11. **Sentencing Options for Grade B and C Violations Only:**

(CHECK APPROPRIATE BOX)

(A) If the minimum term of imprisonment determined under 7B1.4 (Term of Imprisonment) is at least one month but not more than six months, 7B1.3(c)(1) provides sentencing options to Imprisonment.

(B) If the minimum term of imprisonment determined under 7B1.4 (Term of Imprisonment) is more than six months but not more than ten months, 7B1.2(c)(2) provides sentencing options to imprisonment.

X (C) If the minimum term of imprisonment determined under 7B1.4 (Term of Imprisonment) is more than ten months, no sentencing options to imprisonment are available.

DEFENDANT *Cornell Johnson*

12. **Unsatisfied Conditions of Original Sentence**

List any restriction, fine, community confinement, home detention, or intermittent confinement previously imposed in connection with the sentence for which revocation is ordered that remains unpaid or unserved at the time of revocation (*See* 7B1.3(d)):

Restitution $3,386.96
Community Confinement

Fine $

Home Detention

Other

Intermittent Confinement

13. **Supervised Release**

If probation is to be revoked, determine the length, if any, of the term of supervised release according to the provisions of 5D1.1-1.3 (*See* 7B1.3(g)(1)).

Term to years

If supervised release is revoked and the term of imprisonment imposed is less than the maximum term of imprisonment imposable upon revocation, the defendant may, to the extent permitted by law, be ordered to recommense supervised release upon release from imprisonment (*See* 18:3583(e) and 7B1.3(g)(2)).

Period of supervised release to be served following release from imprisonment:

Up to 36 months less any term of imprisonment imposed provided that the term of imprisonment is less than 24 months.

14. **Departure**

List aggravating and mitigating factors that may warrant a sentence outside the applicable range of imprisonment:

15. **Official Detention Adjustment** (*See* 7B1.3(e)): months days.

UNITED STATES DISTRICT COURT
Eastern District of Tennessee at Chattanooga

UNITED STATES OF AMERICA

v.

Cornell Johnson

JUDGMENT IN A CRIMINAL CASE

(Filed May 1, 1998)

(For **Revocation** of Probation or Supervised Release)
(For Offenses Committed On or After November 1, 1987)

Case Number: **1:93CR00138-002**

Perry H. Piper
Defendant's Attorney

THE DEFENDANT:

[X] admitted guilt to violation of condition(s) **#1 and general cond.** of the term of supervision.

[ ] was found in violation of condition(s) _____ after denial of guilt.

Violation Number	Nature of Violation	Date Violation Occurred
1	The defendant failed to comply with the condition that he not commit another federal, state, or local crime.	03/03/1996
2	The defendant failed to comply with the condition that he not leave the judicial district without the permission of the Court or probation officer.	03/03/1996

The defendant is sentenced as provided in pages 2 through **6** of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has not violated condition(s) _____ and is discharged as to such violation(s) condition.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: **250-04-0337**

Defendant's Date of Birth: **05/09/1954**

Defendant's USM No.: **84669-071**

Defendant's Residence Address:
845 North Central Avenue #615
Hapevill GA 30354

Defendant's Mailing Address:
845 North Central Avenue #615
Hapevill GA 30354

04/30/1998
Date of Imposition of Judgment

/s/ **R. Allen Edgar**
Signature of Judicial Officer

R. ALLAN EDGAR
United States District Judge
Name & Title of Judicial Officer

May 1, 1998
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **18 month(s)**.

[ ] The court makes the following recommendations to the Bureau of Prisons:

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district:

[ ] at ____ a.m./p.m. on ____.
[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] before 2 p.m. on _____.
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **12 month(s)**.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[X] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

See Special Conditions of Supervision – Page 4

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a program of testing and treatment for drug and alcohol abuse as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.

The defendant shall participate in a program of mental health treatment as directed by the probation officer.

The defendant shall pay any restitution that remains unpaid at the commencement of the term of supervision.

The defendant shall provide the probation officer with access to any requested financial information.

The defendant shall not incur any credit charges or open additional lines of credit without the approval of the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	**$**	**$**	**$ 3,286.96**

[ ] If applicable, restitution amount ordered pursuant to plea agreement ..... $ _____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ _____

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred _____. An Amended Judgment in a Criminal Case will be entered after such a determination.

[X] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Western Union	$3,000.00	$3,000.00	
Food Lion, Incorporated	$286.96	$286.96	
Totals:	$ 3,286.96	$ 3,286.96	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [X] in full immediately; or

B [ ] $ _____ immediately, balance due (in accordance with C, D, or E); or

C [ ] not later than _____; or

D [ ] in installments to commence ____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and

shall request the court to establish a payment schedule if appropriate; or

E [ ] in _____ (*e.g. equal, weekly, monthly, quarterly*) installments of $ _____ over a period of ____ year(s) to commence ____ day(s) after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

Payments shall be made to: U.S. DISTRICT COURT, 800 MARKET ST., SUITE 130, KNOXVILLE, TN 37902

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States attorney.

No. 98-5664

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	O R D E R
v.	)	(Filed Apr. 29, 1999)
CORNELL JOHNSON,	)	
Defendant-Appellant.	)	

Before: MARTIN, Chief Judge; BOGGS and COLE, Circuit Judges.

Cornell Johnson, represented by counsel, appeals a district court judgment imposing a new term of supervised release, following the revocation of his original term of supervised release. The parties have expressly waived oral argument, and this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

In 1994, Johnson pleaded guilty to conspiring to defraud, produce, use, and traffic in one or more counterfeit access devices, in violation of 18 U.S.C. § 1029(b)(2). The district court sentenced him to twenty-five months of imprisonment, plus three years of supervised release. While on supervised release, Johnson committed various state law offenses in Virginia, and he left the judicial district without permission. During a revocation hearing, Johnson admitted that he had violated the terms of his original supervised release, and the district court sentenced him to eighteen months of imprisonment, plus

twelve months of supervised release. Johnson has filed a timely appeal, arguing that the new term of supervised release violates the Ex Post Facto Clause.

Upon review, we conclude that the district court properly sentenced Johnson. *See United States v. Lloyd*, 10 F.3d 1197, 1220 (6th Cir. 1993), *cert. denied*, 511 U.S. 1043 *and* 1146 *and* 513 U.S. 883 (1994). Johnson's sentence does not violate the Ex Post Facto Clause. In order for a statutory modification of punishment to run afoul of the Ex Post Facto Clause: 1) the statute must apply retroactively to past conduct; and 2) the statute must work to the prejudice or disadvantage of the defendant. *See Miller v. Florida*, 482 U.S. 423, 430 (1987). This court has rejected Johnson's argument, concluding that the application of § 3583(h) does not violate the Ex Post Facto Clause. *See United States v. Abbington*, 144 F.3d 1003, 1005 (6th Cir.), *cert. denied*, 119 S. Ct. 344 (1998); *United States v. Page*, 131 F.3d 1173, 1175 (6th Cir. 1997), *cert. denied*, 119 S. Ct. 77 (1998). Although several other circuits have concluded that the application of § 3583(h) does violate the Ex Post Facto Clause, *see United States v. Lominac*, 144 F.3d 308, 312-16 (4th Cir. 1998); *United States v. Dozier*, 119 F.3d 239, 242-44 (3d Cir. 1997); *United States v. Collins*, 118 F.3d 1394, 1397-99 (9th Cir. 1997); *United States v. Meeks*, 25 F.3d 1117, 1119 (2d Cir. 1994), these cases are not controlling authority in this circuit.

Accordingly, we affirm the district court's judgment.

ENTERED BY ORDER OF
THE COURT

/s/ Leonard Green
Clerk

Supreme Court of the United States

No. 99-5153

Cornell Johnson,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Sixth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 18, 1999

Supreme Court, U.S.
FILED
DEC - 2 1999
OFFICE OF THE CLERK

No. 99-5153

In The

Supreme Court of the United States

CORNELL JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR PETITIONER CORNELL JOHNSON

JEFFREY T. GREEN
JOSEPH S. MILLER
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Of Counsel

LEAH J. PREWITT
RITA C. LALUMIA*
DAVID F. NESS
FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.
707 Georgia Avenue, Suite 203
Chattanooga, Tennessee 37402
(423) 756-4349

Counsel for Petitioner
Cornell Johnson

**Counsel of Record*

December 2, 1999

COCKLE LAW BRIEF PRINTING ... (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

57pp

QUESTION PRESENTED

Whether reimposition of supervised release pursuant to 18 U.S.C. § 3583(h), following revocation of Petitioner's original supervised release sentence, violates the Ex Post Facto Clause of the United States Constitution when Petitioner's conviction for the underlying offense occurred before section 3583(h) was enacted.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 9

ARGUMENT 11

I. THE APPLICATION OF SECTION 3583(h) TO PETITIONER INCREASED THE PUNISHMENT FOR HIS CRIME AFTER ITS COMMISSION, IN VIOLATION OF THE EX POST FACTO CLAUSE 11

A. Application of Section 3583(h) in Mr. Johnson's Case Is Retrospective Because The Conditions For Supervised Release And The Consequences Of Its Revocation Are Integral Parts Of The Punishment Attached To The Original Conviction 13

B. As Applied To Mr. Johnson, Section 3583(h) Violates The Ex Post Facto Clause By Retroactively Increasing The Punishment For His Crime 21

C. Retroactive Application Of Section 3583(h) Violates The Fundamental Interests That The Ex Post Facto Clause Is Designed To Protect 32

TABLE OF CONTENTS – Continued

Page

II. THE COURT OF APPEALS ERRONEOUSLY VIEWED PETITIONER'S POST-REVOCATION REIMPRISONMENT AND SECOND SUPERVISED RELEASE AS PUNISHMENT FOR A POST-AMENDMENT CRIME 34

CONCLUSION 37

STATUTORY APPENDIX 1a

TABLE OF AUTHORITIES

Page

CASES

Bifulco v. United States, 447 U.S. 381 (1980) 28

Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) 12, 34

California Dep't of Corrections v. Morales, 514 U.S. 499 (1995) 12, 25, 26, 32

Collins v. Youngblood, 497 U.S. 37 (1990) 11

Dobbert v. Florida, 432 U.S. 282 (1977) 21, 30

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) 20

Hill v. Lockhart, 474 U.S. 52 (1985) 33

Hudson v. United States, 118 U.S. 488 (1997) 14

In re Winship, 397 U.S. 358 (1970) 20

Kansas v. Hendricks, 521 U.S. 346 (1997) 14

Landgraf v. USI Film Prods., 511 U.S. 244 (1994)...11, 29

Lindsey v. Washington, 301 U.S. 397 (1937) ...22, 23, 24, 30

Lynce v. Mathis, 519 U.S. 433 (1997) ..... *passim*

Miller v. Florida, 482 U.S. 423 (1987)...12, 23, 24, 30, 32

Monge v. California, 118 S. Ct. 2246 (1998) 20

Ralston v. Robinson, 454 U.S. 201 (1981)..... 18

Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994) 29

United States Parole Comm'n v. Williams, 54 F.3d 820, (D.C. Cir. 1995)..... 5

TABLE OF AUTHORITIES – Continued

Page

United States v. Abbington, 144 F.3d 1003 (6th Cir.), *cert. denied*, 119 S. Ct. 344 (1998)..... 9, 19, 35

United States v. Amer, 110 F.3d 873 (2d Cir. 1997) 21

United States v. Behnezhad, 907 F.2d 896 (9th Cir. 1990)..... 5

United States v. Collins, 118 F.3d 1394 (9th Cir. 1997)..... 31

United States v. Cooper, 962 F.2d 339 (4th Cir. 1992) 5

United States v. Dozier, 119 F.3d 239 (3d Cir. 1997) 31

United States v. Eske, 189 F.3d 536 (7th Cir. 1999) 31

United States v. Holmes, 954 F.2d 270 (5th Cir. 1992)..... 5, 27, 28

United States v. Koehler, 973 F.2d 132 (2d Cir. 1992) 5

United States v. Malesic, 18 F.3d 205 (3d Cir. 1994) 5

United States v. McGee, 981 F.2d 271 (7th Cir. 1992) 5

United States v. O'Neil, 11 F.3d 292 (1st Cir. 1993) 5

United States v. Page, 131 F.3d 1173 (6th Cir. 1997), *cert. denied*, 119 S. Ct. 77 (1998)..... 9, 19, 27, 35

United States v. Rockwell, 984 F.2d 1112 (10th Cir. 1993)..... 5

United States v. Schrader, 973 F.2d 623 (8th Cir. 1992)..... 5

United States v. Soto-Olivas, 44 F.3d 788 (9th Cir. 1995)..... 21

United States v. Tatum, 998 F.2d 893 (11th Cir. 1993) 5

United States v. Truss, 4 F.3d 437 (6th Cir. 1993) ...5, 27

TABLE OF AUTHORITIES – Continued

Page

United States v. Woodrup, 86 F.3d 359 (4th Cir. 1996) 21

United States v. Wyatt, 102 F.3d 241 (7th Cir. 1996) 21

Weaver v. Graham, 450 U.S. 24 (1981) ..... *passim*

CONSTITUTION

U.S. Const. art. I, § 9, cl. 3 1

FEDERAL STATUTES

Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796..... 1

18 U.S.C. § 1029(b)(2)..... 2

§ 1029(c)(1)..... 2

§ 3553(a) 15

§ 3559(a)(4)..... 2

§ 3583..... *passim*

RULE

Fed. R. Crim. P. 11(c)(1) 33

SCHOLARLY AUTHORITIES

Bryan R. Diederich, Note, *Risking Retroactive Punishment: Modifications of the Supervised Release Statute and the Ex Post Facto Prohibition*, 99 COLUM. L. REV. 1551 (1999).....7, 33, 34

TABLE OF AUTHORITIES – Continued

Page

Ryan M. Zenga, Note, *Retroactive Law or Punishment for a New Offense? The Ex Post Facto Implications of Amending the Statutory Provision Governing Violations of Supervised Release*, 19 W. NEW ENG. L. REV. 499 (1997) 36

OTHER AUTHORITY

United States Sentencing Commission, *Guidelines Manual* (Nov. 1998)..... 18

OPINIONS BELOW

The unpublished order of the court of appeals is provided in the Joint Appendix ("J.A.") at 48-49. The district court's judgment of revocation is provided in the Joint Appendix, along with the transcript of the revocation hearing. J.A. 38-47 (Judgment), 21-29 (Transcript).

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1999. The petition for writ of certiorari was filed on July 2, 1999 and granted on October 18, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Ex Post Facto Clause of the United States Constitution, Article I, Section 9, clause 3 provides that "[n]o Bill of Attainder or ex post facto Law shall be passed" by Congress.

2. The key statute involved in this case is 18 U.S.C. § 3583. Congress amended section 3583 on September 13, 1994 by, *inter alia*, adding subsection (h) to the statute. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110505(3), 108 Stat. 1796, 2017. The text of the pre-amendment and post-amendment versions of section 3583 are set forth in a Statutory Appendix to this brief.

STATEMENT OF THE CASE

1. On March 8, 1994, Petitioner Cornell Johnson pleaded guilty to a credit card crime, that is conspiring to defraud, produce, use, and traffic in one or more counterfeit access devices, an act that occurred "on or about October 22, 1993," in violation of 18 U.S.C. § 1029(b)(2). J.A. 2-3, 7-8. The offense was punishable by a maximum term of imprisonment of five years, a fine of not more than $250,000 and a term of up to three years of supervised release, *see* 18 U.S.C. § 1029(b)(2), (c)(1); 18 U.S.C. § 3583(a), (b)(2), and was therefore a Class D felony, *see* 18 U.S.C. § 3559(a)(4). The district court sentenced Mr. Johnson to 2 years and 1 month of imprisonment and 3 years of supervised release. J.A. 9-10.

Mr. Johnson's supervised release sentence included numerous restrictions on his personal liberty. Some of the restrictions are "standard conditions," such as the requirements that he "not leave the judicial district without the permission of the court or probation officer," that he "notify the probation officer within 72 hours of any change in residence or employment," and that he "permit a probation officer to visit him . . . at any time at home or elsewhere." J.A. 12-13. Additionally, the district court ordered a number of special restrictions on personal liberty that were specific to Mr. Johnson. These "special conditions" included the requirements that he "provide the probation officer with access to any requested financial information," that he "not incur new credit charges or open additional lines of credit without the approval of the probation officer," that he "participate in a program of testing and/or treatment for drug and/or alcohol

abuse," and that he "participate in a program of mental health treatment." *Id.* at 11.

2. At the time Mr. Johnson pleaded guilty, the statute governing the imposition of supervised release as part of a criminal sentence – 18 U.S.C. § 3583 – enumerated several options available to the district courts to respond to a defendant's violation of the conditions of his supervised release term. Two of the options specified in section 3583(e) are relevant in this case:

> The court may . . .
>
> (2) *extend a term of supervised release if less than the maximum authorized term was previously imposed*, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision; [or]
>
> (3) *revoke* a term of supervised release, *and require the person to serve in prison all or part of the term of supervised release without credit for time previously served on postrelease supervision*, if it finds by a preponderance of the evidence that the person violated a condition of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure that are applicable to probation revocation and to the provisions of applicable policy statements issued by the Sentencing Commission, except that *a person whose term is revoked under this paragraph may not be required to serve* more than 3

> years in prison if the offense for which the person was convicted was a Class B felony, or *more than 2 years in prison if the offense was a Class C or D felony;*. . . .

Statutory Appendix ("S.A.") 2a (emphasis added).[1] Thus, the district court could *either* extend the term of supervised release to the maximum available term, *or* revoke supervised release and order reimprisonment for all or part of the supervised release term that had been originally imposed. Where, as here, the underlying offense was a Class D felony, post-revocation reimprisonment could not exceed two years. *Id.*

At his sentencing hearing in 1994, the court sentenced Mr. Johnson to a post-imprisonment term of three years of supervised release – the maximum allowed under the statute in effect at the time. S.A. 1a.[2] Because the district court imposed the maximum term of supervised release allowable under Mr. Johnson's original sentence, the option provided by subsection (e)(2) to "extend a term of supervised release" would not be available to the district court if Mr. Johnson later violated his supervised release conditions. Rather, pursuant to the pre-amendment version of section 3583, the district court could revoke Mr. Johnson's supervised release sentence and order Mr. Johnson to be reimprisoned for up to two

---

[1] The other mechanisms provided in subsection (e) – terminating supervised release altogether (subsection (e)(1)), and imposing home confinement (subsection (e)(4)) – are not relevant in the context of this case. *See* S.A. 2a.

[2] The same three-year maximum term of supervised release applies for Class D felonies under the post-amendment version of section 3583(b)(2). S.A. 4a.

years in the event he violated the conditions of supervised release. *See* S.A.1a – 2a (18 U.S.C § 3583(e)(3) (capping term of reimprisonment at two years for Class D felony)).

When Mr. Johnson was convicted, the circuit courts of appeals were split on the question whether subsection (e) of section 3583 empowered a district court to attach another term of supervised release to a prison term that was imposed upon revocation of the original supervised release term. Of the twelve circuit courts of appeals, nine – including the Sixth Circuit, where Mr. Johnson was convicted and sentenced – concluded that subsection (e) did *not* empower district courts to impose another supervised release term.[3] Only two – the First and Eighth Circuits – concluded that subsection (e) did provide district courts this power.[4] The District of Columbia Circuit has not considered the question. *See United States Parole Comm'n v. Williams*, 54 F.3d 820, 824 (D.C. Cir. 1995) (noting circuit split regarding subsection (e) and addition of subsection (h), and concluding that "[t]his court has

---

[3] *See United States v. Koehler*, 973 F.2d 132, 134-36 (2d Cir. 1992); *United States v. Malesic*, 18 F.3d 205, 206 (3d Cir. 1994); *United States v. Cooper*, 962 F.2d 339, 341-42 (4th Cir. 1992); *United States v. Holmes*, 954 F.2d 270, 272-73 (5th Cir. 1992); *United States v. Truss*, 4 F.3d 437, 441 (6th Cir. 1993); *United States v. McGee*, 981 F.2d 271, 274-76 (7th Cir. 1992); *United States v. Behnezhad*, 907 F.2d 896, 898-99 (9th Cir. 1990); *United States v. Rockwell*, 984 F.2d 1112, 1116-17 (10th Cir. 1993); *United States v. Tatum*, 998 F.2d 893, 895-96 (11th Cir. 1993).

[4] *See United States v. O'Neil*, 11 F.3d 292, 293 (1st Cir. 1993); *United States v. Schrader*, 973 F.2d 623, 625 (8th Cir. 1992).

not yet addressed the issue, and we see no need to do so in this case").

3. In September 1994, almost a year after Mr. Johnson committed the underlying access-device crime and six months after his conviction, Congress amended section 3583. Among the changes Congress made is the addition of subsection (h) to the statute.[5] This subsection provided district courts with a new way to respond to a defendant's supervised release violation:

> When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term of imprisonment authorized under subsection (e)(3), *the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment*. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

S.A. 7a (emphasis added). By adding this subsection, Congress thus gave the district courts a power they lacked under pre-amendment section 3583(e).

It is noteworthy, in the context of this case, that subsection (h) empowers district courts to impose lengthier terms of punishment than were possible under pre-amendment section 3583(e)(3). For example, a person

---

[5] The wording of subsection (e) was also changed in immaterial respects, and a 5-year reimprisonment cap for Class A felonies was added. *See* S.A. 4a-6a.

convicted of a Class D felony might be initially sentenced to up to three years of post-imprisonment supervised release. Under the pre-amendment section 3583(e)(3), upon revocation of supervised release the district court could order that the offender be reimprisoned for a term no greater than two years (the statutory cap for Class D felonies) but the court could *not* order that the defendant be placed on a term of supervised release after this term of reimprisonment. *See* S.A. 2a. Under section 3583(h), by contrast, the district court could order that the defendant be reimprisoned for any term less than two years (*e.g.*, two years less one day) *and* that he be subject to supervised release for the balance of the three-year maximum term of punishment (*e.g.*, one year and one day).[6] Under the new statute, punishment for violating supervised release conditions could thus last for up to three years, rather than the previous maximum of two years.

4. Mr. Johnson began serving his original supervised release term in August 1995. J.A. 18. Under his 1994 sentence, Mr. Johnson's supervised release term would have expired in August 1998. *Id.* On March 3, 1996, however, Mr. Johnson was arrested in Newport News, Virginia and charged with fraud and uttering a forged instrument in violation of Virginia state law. *Id.* at 18-19, 33-34. On March 5, 1996, the United States Probation Office filed a petition that alleged that Mr. Johnson violated his supervised release conditions by traveling from

---

[6] This illustration is drawn from Bryan R. Diederich, Note, *Risking Retroactive Punishment: Modifications of the Supervised Release Statute and the Ex Post Facto Prohibition*, 99 Colum. L. Rev. 1551, 1557 (1999) (hereinafter "*Risking Retroactive Punishment*").

his district of supervision (the Northern District of Georgia) to Virginia without permission, and by committing the state-law crimes in Virginia. *Id.* at 18-19.

On July 25, 1996, Mr. Johnson was convicted in the Circuit Court of Newport News, Virginia of the offenses of forgery and uttering a forged instrument. J.A. 33-34. He was sentenced to a ten-year term of imprisonment for each violation, and the court suspended the execution of nine years of his sentence for the offense of forgery, and nine and one-half years for the offense of uttering a false instrument. *Id.* Mr. Johnson was also convicted for the offenses of obtaining money by false pretense and larceny by false pretense, and he was ordered to serve a 12-month jail term on each charge. *Id.* at 34. Mr. Johnson remained in the custody of the State of Virginia until his release to the federal detainer on March 31, 1998. *Id.* A removal hearing was held in Federal District Court for the Eastern District of Virginia and Mr. Johnson was ordered returned to the Eastern District of Tennessee to answer the charge that he violated the terms of his supervised release. *Id.*

On April 30, 1998, after a hearing on the record at which Mr. Johnson admitted violating his supervised release conditions, the district court revoked Mr. Johnson's original supervised release term. J.A. 23-26. The district court ordered Mr. Johnson to be incarcerated for 1½ years and imposed another term of supervised release to follow for one year, for a total of 2½ years of punishment. *Id.* at 26, 38-47. The restrictions placed upon Mr. Johnson as a result of revocation exceeded the maximum possible sentence under the pre-amendment version of section 3583(e)(3) by six months. At the revocation

hearing, Mr. Johnson's counsel expressly objected to the imposition of another term of supervised release under section 3583(h) as a violation of the Ex Post Facto Clause. *Id.* at 27-29. The district court, however, followed the law of the circuit and applied the provisions of section 3583(h) to Mr. Johnson.

Mr. Johnson appealed the district court's order of revocation to the United States Court of Appeals for the Sixth Circuit. His sole contention on appeal was that application of section 3583(h) to his case violated the Ex Post Facto Clause because he committed the underlying access-device crime in 1993 and was convicted and sentenced on March 8, 1994 – six months before Congress enacted section 3583(h). The court of appeals affirmed Mr. Johnson's sentence in a two-page unpublished order on the basis of its holdings in prior cases. J.A. 48-49. According to the court of appeals, it "ha[d] rejected Johnson's argument, concluding that the application of § 3583(h) does not violate the Ex Post Facto Clause." *Id.* at 49 (citing *United States v. Abbington*, 144 F.3d 1003, 1005 (6th Cir.), *cert. denied*, 119 S. Ct. 344 (1998), and *United States v. Page*, 131 F.3d 1173, 1175 (6th Cir. 1997), *cert. denied*, 119 S. Ct. 77 (1998)).

SUMMARY OF THE ARGUMENT

The Sixth Circuit Court of Appeals determined that reimposition of a term of supervised release for Mr. Johnson, following revocation of his initial term of supervised release, does not violate the Ex Post Facto Clause. The Sixth Circuit so held despite the fact that the statute

which empowers a district court to reimpose supervised release upon revocation of the defendant's initial term of supervised release – 18 U.S.C. § 3583 (h) – was not enacted by Congress until six months after Mr. Johnson was convicted and sentenced for the underlying offense that resulted in his original term of supervised release. Furthermore, application of section 3583(h) to Mr. Johnson resulted in a revocation punishment that was actually six months longer than that which was available at the time he was sentenced for the underlying offense.

The application of section 3583(h) to Mr. Johnson, who was convicted before this provision was added to the supervised release statute, violates the Ex Post Facto Clause. The text and structure of section 3583 demonstrate that both a supervised release term and the consequences of its violation are integral parts of the punishment for the underlying crime of conviction, not for any subsequent violation of supervised release conditions. Under the pre-amendment statute governing supervised release in effect at the time Mr. Johnson committed his underlying crime, the district court was limited to ordering Mr. Johnson to serve a total term of 2 years of incarceration upon revocation of supervised release. However, after applying subsection (h) to Mr. Johnson, the district court ordered him to serve a 2½ year sentence, which included one year of supervised release not previously authorized by law. The punishment was thus increased in length and nature, and imposed greater restrictions on Mr. Johnson's liberty than were authorized at the time of his underlying offense.

The application of section 3583(h) to Mr. Johnson plainly violates the policies embodied in the Ex Post

Facto Clause of the United States Constitution. The Clause prohibits laws that retroactively inflict a greater punishment than the punishment attached to a crime when the crime was committed. Application of subsection (h) in Mr. Johnson's case violates the Ex Post Facto Clause and the order reimposing supervised release should be reversed.

ARGUMENT

"The presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen." *Lynce v. Mathis*, 519 U.S. 433, 439 (1997). That presumption " 'is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.' " *Id.* (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994)). The retroactive application of section 3583(h) to reimpose a term of supervised release on Mr. Johnson unravels the mantle of protection mandated by the Ex Post Facto Clause, and the order reimposing supervised release should thus be reversed.

I. THE APPLICATION OF SECTION 3583(h) TO PETITIONER INCREASED THE PUNISHMENT FOR HIS CRIME AFTER ITS COMMISSION, IN VIOLATION OF THE EX POST FACTO CLAUSE.

The Ex Post Facto Clause of the United States Constitution flatly prohibits laws that retroactively increase the punishment attached to a crime. *See Lynce v. Mathis*, 519 U.S. 433, 441 (1997); *Collins v. Youngblood*, 497 U.S. 37, 43

(1990); *Miller v. Florida*, 482 U.S. 423, 429 (1987). Early in the history of our Republic, the Court established that "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed" is prohibited by the Ex Post Facto Clause. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (Chase, J.). As the Court explained in *Weaver v. Graham*,

> [t]hrough this prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed. The ban also restricts governmental power by restraining arbitrary and potentially vindictive legislation.

450 U.S. 24, 30 (1981); *see also Lynce*, 519 U.S. at 440 ("the Constitution places limits on the sovereign's ability to use its lawmaking power to modify bargains it has made with its subjects"). Because it permits increased punishment, the retroactive application of section 3583(h) thus implicates the "central concerns" of the Ex Post Facto Clause: " 'the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated'." *Lynce*, 519 U.S. at 441 (quoting *Weaver*, 450 U.S. at 30).

To run afoul of the Ex Post Facto Clause, a statute must be retrospective in application, and it must disadvantage the offender affected by it by altering the definition of criminal conduct or increasing the punishment for the crime. *See Lynce*, 519 U.S. at 441; *California Dep't of Corrections v. Morales*, 514 U.S. 499, 506 n.3 (1995); *Miller*, 482 U.S. at 430. The application of section 3583(h) to Mr. Johnson, who was convicted before this provision was added to the supervised release statute, meets both

aspects of this test. First, the text and structure of section 3583 demonstrate that both a supervised release term and the consequences of its violation are integral parts of the punishment for the underlying crime of conviction. Second, section 3583(h), when retroactively applied to Mr. Johnson, increased the punishment for his underlying crime of conviction by six months, an increase that is manifestly to his disadvantage. Finally, the application of section 3583(h) to Mr. Johnson plainly violates the core public policies embodied in the Ex Post Facto Clause.

A. Application of Section 3583(h) in Mr. Johnson's Case Is Retrospective Because The Conditions For Supervised Release And The Consequences Of Its Revocation Are Integral Parts Of The Punishment Attached To The Original Conviction.

A law is retrospective if it imposes greater punishment after the commission of the offense than that which was allowable when the offense was committed. *See Weaver*, 450 U.S. at 28-33. Importantly, "it is the effect, not the form, of the law that determines whether it is *ex post facto*." *Id.* at 31. Subsection (h), if applied to the revocation of a supervised release term that was originally imposed before September 13, 1994, is retrospective for purposes of the Ex Post Facto Clause.

1. The text, structure and operation of the supervised release statute make clear that a supervised release term is part of the sentence for the underlying offense. According to section 3583(a), supervised release is imposed "as a part of the sentence" for the original crime

of conviction.[7] S.A. 1a (pre-amendment), 4a (post-amendment). In addition, section 3583(b) sets the maximum allowable supervised release term according to the grade of the original offense. *Id.* For example, a Class B felony may be punished with a supervised release term of up to five years, whereas a Class D felony can be punished

---

[7] This fact alone forecloses any argument that supervised release does not constitute criminal punishment for Ex Post Facto Clause purposes. The determination whether a penalty is criminal or civil is a matter of statutory interpretation, and both the Double Jeopardy and Ex Post Facto Clauses call for the same methodology. *See Kansas v. Hendricks*, 521 U.S. 346, 360-71 (1997) (applying same statutory construction methodology to determine nature of penalty for both double jeopardy and ex post facto purposes). "A court must first ask whether the legislature, 'in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.' " *Hudson v. United States*, 118 U.S. 488, 493 (1997). Congress placed the supervised release provision at issue in Title 18, of U.S. Code which is devoted to crimes and criminal procedures, and expressly provided that a "court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include *as a part of the sentence* a requirement that the defendant be placed on a term of supervised release after imprisonment." 18 U.S.C. § 3583(a). Supervised release, therefore, is a criminal punishment on its face, and that is the end of the inquiry. *See Hudson*, 118 U.S. at 493. Moreover, even if one were to go beyond the plain terms of the statute, all the relevant factors indicate that supervised release is a criminal punishment: (1) it imposes affirmative restraints on personal liberty; (2) it comes into play only upon the finding of *scienter* connected with the crime of conviction; (3) it promotes the traditional aims of punishment, retribution and deterrence; and (4) it applies only when there is a criminal conviction, as part of the sentence for that conviction. *See id.* at 493 (listing factors used to determine whether a nominally civil penalty is, in fact, a criminal punishment).

with a supervised release term of up to three years. 18 U.S.C. § 3583(b). Also, under section 3583(c), in determining whether to impose a term of supervised release and in determining the length of any such term of supervised release, the district court "shall consider the factors set forth in" certain sections of 18 U.S.C. § 3553(a), the general sentencing statute that provides factors for the court to consider in imposing a sentence. S.A. 1a (pre-amendment), 4a (post-amendment). At every step, section 3583 unequivocally tethers the supervised release sentence to the original crime of conviction.

The plain language and operation of the supervised release statute illustrate that the consequences of violating supervised release conditions are also tied to the underlying conviction. Under both the pre-amendment and post-amendment versions of section 3583(e)(3), the maximum allowable term of reimprisonment that can be imposed as a sanction for violating supervised release, as with the original supervised release term itself, is a function of the grade of the underlying crime of conviction. S.A. 2a (pre-amendment), 6a (post-amendment). The nature or degree of the subsequent violation of supervised release does not and cannot affect the *maximum* period of reimprisonment allowed under the revocation provisions. The statute is plainly tied only to the underlying crime, not to the subsequent violation.

For example, in accordance with the structure of the statute, two defendants who violate supervised release in the same way, no matter what the severity of the violation, can receive dramatically different sanctions if their original crimes differed in grade. Compare two defendants who leave the jurisdiction of their supervision

without permission: one convicted of a Class B felony may be reimprisoned for up to three years upon revocation of his supervised release term. 18 U.S.C. § 3583(e)(3).[8] By contrast, a defendant convicted of a class D felony can be reimprisoned for *no more than two years*. 18 U.S.C. § 3583(e)(3).[9] This substantial difference in the maximum allowable term of reimprisonment is justified only by the difference in the two defendants' underlying crimes of conviction.

Subsection (h), added to section 3583 in September 1994, is just as strongly tethered to the original crime of conviction as to the reimprisonment sanction of subsection (e)(3). This new provision caps the length of any additional supervised release term according to the grade of the original offense, as follows:

> The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for *the offense that resulted in the original term of supervised release*, less any term of imprisonment that was imposed upon revocation of supervised release.

18 U.S.C. § 3583(h) (emphasis added). As a result, the district court is unable to compute the maximum permissible post-revocation supervised release term unless it first determines the grade of the underlying offense that resulted in the original term of supervised release.

---

[8] This is the case under both the pre-amendment and post-amendment versions of section 3583. *See* S.A. 2a, 5a-6a.

[9] This is the case under both the pre-amendment and post-amendment versions of section 3583. *See* S.A. 2a, 5a-6a.

That the reimposition of supervised release following revocation pertains to the underlying offense makes logical sense when one considers that any criminal offense that forms the basis for a violation of supervised release is punished separately and apart from any revocation sanction. Here, for example, Mr. Johnson was incarcerated in Virginia as a result of the state criminal offenses that partially formed the basis for his revocation of supervised release. Upon revocation of Mr. Johnson's supervised release, the federal district court had no authority to separate criminal sanctions for his state court offenses.

The new provision in section 3583(h) changes the legal consequences of "the offense that resulted in the original term of supervised release," specifically by exposing Mr. Johnson to successive supervised release periods and, thus, to a punishment longer than that which could have been imposed at the time of his original conviction. Application of section 3583(h) in Mr. Johnson's case is therefore retroactive for ex post facto purposes.

2. According to either the pre-amendment or post-amendment versions of section 3583, supervised release is part of the original sentence for the underlying crime of conviction, and it is this original sentence that is being executed when a defendant is returned to prison (and, under section 3583(h), given another supervised release term) as a sanction for violating the terms of his supervised release. Thus, the proper view of revocation is simply that, by engaging in prohibited conduct (whether criminal in nature or not) during his supervised release term, a defendant triggers the condition that permits the court to modify or increase the terms of the original

sentence.[10] This construction of section 3583 also comports with the "breach of trust" theory that animates the United States Sentencing Commission's implementation of the supervised release system. *See generally* United States Sentencing Commission, *Guidelines Manual* Ch. 7, Pt. A(3)(b) (Nov. 1998). According to the Commission's "breach of trust" theory, although "the nature of the conduct leading to the revocation would be considered in measuring the extent of the breach of trust, imposition of an appropriate punishment for any new criminal conduct would not be the primary goal of a revocation sentence." *Id.* In other words, all other things being equal, a given violation of supervised release such as leaving the jurisdiction without permission, is a more serious matter when it is committed by a Class A felon (*e.g.*, a kidnapper) than when it is committed by a Class D felon (*e.g.*, a credit-card fraud conspirator). That section 3583 provides for a greater maximum punishment time period for Class A felons than for Class D felons reflects this approach.

---

[10] In this sense, the supervised release statute is analogous to the treatment modification provision in the Federal Youth Corrections Act this Court approved in *Ralston v. Robinson*, 454 U.S. 201, 220 n.14 (1981) ("Congress intended that a YCA sentence contain within it the possibility that, if the offender commits a subsequent offense, the court may modify the YCA treatment terms. Such a scheme hardly constitutes multiple punishment, since the offender has, by his own actions, triggered the condition that permits appropriate modification of the terms of confinement. After all, the imposition of confinement when an offender violates his term of probation has never been considered to raise a serious double jeopardy problem.").

3. Respondent will argue that a post-revocation sanction is punishment for the supervised release violation and not for the original crime of conviction, and thus that section 3583(h) is not retrospective for Ex Post Facto Clause purposes. *United States v. Abbington*, 144 F.3d 1003, 1005 (6th Cir.), *cert. denied*, 119 S. Ct. 344 (1998); *United States v. Page*, 131 F.3d 1173, 1175 (6th Cir. 1997), *cert. denied*, 119 S. Ct. 77 (1998). This reasoning is flawed.

First, as demonstrated, the text and structure of both the pre-amendment and post-amendment section 3583 make it clear that post-revocation incarceration and reimposition of a supervised release term pursuant to section 3583(h), both constitute punishment for the original crime and not for the later supervised release violation. Criminal acts that form the basis for revocation are separately punished under the relevant criminal statutes.

Second, many of the restrictions imposed pursuant to a sentence of supervised release proscribe conduct that otherwise would be perfectly lawful, such as leaving the jurisdiction without the permission of a court or probation officer, or opening a credit card account. *See* J.A. 10-13. Although such prohibited conduct is not in itself unlawful, violations of the district court's order imposing such restrictions may nevertheless result in sanctions such as incarceration or reimposition of supervised release. But for the offender's conviction for the underlying offense, though, the district court does not have the authority to place such conditions on a citizen, nor to punish the prohibited conduct with incarceration or further restrictions of one's liberty.

Third, the contention that post-revocation sanctions relate exclusively to the supervised release violation poses grave due process and double jeopardy problems. For example, under section 3583(e)(3), the district court may revoke supervised release when the violation is proved "by a preponderance of the evidence." S.A. 2a (pre-amendment), 6a (post-amendment). However, the Due Process Clause forbids the imposition of a criminal sanction except upon proof that satisfies the "beyond a reasonable doubt" standard. *See In re Winship*, 397 U.S. 358, 364 (1970). As a result, one cannot conclude that post-revocation punishment is based on the supervised release violation alone without calling into question the constitutionality of the revocation proceeding itself. Such an interpretation of section 3583 is to be avoided if possible. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

Similarly, if a post-revocation sanction were punishment for the supervised release violation, the Double Jeopardy Clause would bar the federal government from prosecuting that supervised release violation in a separate federal criminal proceeding. *See Monge v. California*, 118 S. Ct. 2246, 2250 (1998) (Double Jeopardy Clause bars "successive prosecutions for the same offense"). The four circuit courts of appeals to have considered this very Double Jeopardy Clause challenge have concluded that there is no double jeopardy problem precisely because

the post-revocation punishment was punishment for the underlying crime of conviction, *not* for the supervised release violation alone. *See United States v. Amer*, 110 F.3d 873, 884 & n.5 (2d Cir. 1997); *United States v. Woodrup*, 86 F.3d 359, 362 (4th Cir. 1996); *United States v. Wyatt*, 102 F.3d 241, 245 (7th Cir. 1996); *United States v. Soto-Olivas*, 44 F.3d 788, 789-90 (9th Cir. 1995). However, were the Court to conclude in this case that post-revocation sanctions are punishment for the supervised release violation, and not for the original crime giving rise to the violated supervised release term, this settled line of cases rejecting double jeopardy challenges will be thrown into doubt, and the constitutionality of post-revocation proceedings will be subjected to challenge.

B. As Applied To Mr. Johnson, Section 3583(h) Violates The Ex Post Facto Clause By Retroactively Increasing The Punishment For His Crime.

1. "It is axiomatic that for a law to be *ex post facto* it must be more onerous than the prior law." *Dobbert v. Florida*, 432 U.S. 282, 294 (1977). Because section 3583(h) was applied to increase the quantum and nature of Mr. Johnson's punishment, it clearly meets this standard.

When the district court revoked Mr. Johnson's original supervised release term, it imposed a new sanction of incarceration for 1½ years and another term of supervised release for one year, for a total of 2½ years of punishment. While the new term of incarceration fell within the two-year period authorized by the statute, the district court further extended petitioner's sentence by

imposing an additional year of supervised release. The supervised release "tail" impermissibly extended Mr. Johnson's punishment in a manner plainly not authorized under the pre-amendment revocation provision in subsection (e)(3). Moreover, the length of the overall sanction ordered by the district court exceeded by six months the maximum period of restraint authorized by statute. As such, application of section 3583(h) in this case violates the Ex Post Facto Clause.

This Court's previous ex post facto decisions compel the conclusion that the application of section 3583(h) to Mr. Johnson is unconstitutional. For example, in *Lindsey v. Washington*, 301 U.S. 397 (1937), the sentencing court had imposed as a mandatory minimum sentence the same sentence that had previously been the maximum sentence for the crime of grand larceny under the previous law. *Id.* at 398-400. This Court held that the application of this new statute to persons who committed grand larceny before its enactment violated the Ex Post Facto Clause, because it increased the measure of punishment prescribed by the statute in effect when the crimes were committed. *See id.* at 400-01. The Court rejected the argument that application of the new statute was constitutional for the reason that the sentencing court *might* have imposed the statutory maximum under the old statute, which would have resulted in the same prison sentence imposed by application of the new statute. *See id.* The Court emphasized that the constitutional infirmity of the statute was the detrimental change to the *possible penalty* for a crime already consummated. *See id.* at 401. The new

statute clearly increased the possible range of punishment, transforming what had been the punishment "ceiling" into a minimum mandatory "floor" of punishment. Application of the new range of punishment was impermissible, because the defendant was exposed to new mandatory provisions as well as a greater range of punishment.

Here, with application of subsection (h), Mr. Johnson suffered the imposition of an additional punishment, unauthorized under the pre-amendment version of subsection (e)(3), in the form of reimposition of supervised release. Moreover, the addition of one year of supervised release caused the entire period of punishment to exceed that which was possible under the pre-amendment version of (e)(3). *Lindsey*, however, forecloses the imposition of a *new* form of punishment under the new statute and highlights the ex post facto violation that results from imposing a punishment that extends beyond the range previously authorized by the pre-amendment version of subsection (e)(3).

Reaffirming the basic principle of *Lindsey*, the Court held in *Weaver*, *Miller*, and *Lynce* that statutes that alter the formula used to calculate the sentences of individuals who committed crimes before the changes were enacted violate the Ex Post Facto Clause. The offending statute in *Weaver* retroactively reduced the gain time credits an inmate could earn to reduce his sentence for compliance with prison rules. *See Weaver*, 450 U.S. at 26-28. "The new statute" in *Weaver* "did not withdraw any credits already awarded to Weaver, but by curtailing the availability of future credits it effectively postponed the date when he would become eligible for early release." *Lynce*, 519 U.S.

at 442. The Court unanimously concluded that this statute was unconstitutional.

Importantly, the Court in *Weaver* expressly rejected the government's contention that the statute was not retrospective because it affected gain time credits that had not yet been earned. *See* 450 U.S. at 31-32. The Court rightly concluded that, "[f]or prisoners who committed crimes before its enactment, [the new statute] substantially alters the consequences attached to a crime already completed, and therefore changes the 'quantum of punishment.' " *Id.* at 33 (quoting *Dobbert v. Florida*, 432 U.S. 282, 293-94 (1997). In *Miller*, the statute in question similarly altered the formula for calculating the petitioner's presumptive sentencing range by increasing the number of sentencing "points" assigned to his offense *after* he committed the crime. *See Miller*, 482 U.S. 425-27. The Court struck down the retroactive application of this law as an unconstitutional ex post facto increase in petitioner's punishment. *See id.* at 435-36. Finally, in *Lynce*, the challenged statute retroactively canceled all provisional credits awarded to inmates convicted of particular crimes. *See Lynce*, 519 U.S. at 435-46. Once again, the Court unanimously concluded that this retroactive cancellation, which lengthened the petitioner's sentence after the crime was committed, was unconstitutional. *Id.* at 445-49.

Based on the standards established in *Lindsey*, *Miller*, *Weaver*, and *Lynce*, this case does not present a close question. As a result of the application of section 3583(h) to Mr. Johnson, the quantum of his punishment was increased by six months. Because subsection (h) changed the law as it existed at the time of Mr. Johnson's original

conviction and substantively altered the consequences attached to a crime already committed, this retrospective increase in his punishment cannot stand.

2. This Court's decision in *Morales* does not alter the conclusion that, if applied retroactively, section 3583(h) violates the Ex Post Facto Clause. In *Morales*, this Court held that, in order to establish an ex post facto violation, an offender must show that the retroactive harm is more than some ambiguous "disadvantage," or the mere denial of an uncertain "opportunity" to take advantage of early release provisions. *Morales*, 514 U.S. at 506 n.3. Instead, the *Morales* court explained, a statutory change violates the ex post facto prohibition if it "alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *Id.* at 507 n.3.

The statutory amendment at issue in *Morales* allowed the parole board, after holding an initial parole hearing, to defer for up to three years subsequent parole suitability hearings for prisoners convicted of multiple murders if the board found that it was unreasonable to expect that parole would be granted at a hearing held any sooner. *Id.* at 503-04. Upon review, the Court held that "there [was] no reason to conclude that the amendment will have any effect on any prisoner's actual term of confinement." *Id.* at 512. In other words, the Court's rejection of the ex post facto challenge in *Morales* rested squarely on the conclusion that "a prisoner's ultimate date of release would be entirely unaffected by the change in the timing of [parole] suitability hearings." *Id.* at 513; *see Lynce*, 519 U.S. at 443-44 (discussing *Morales*).

In stark contrast, as applied to Mr. Johnson, section 3583(h) unquestionably "produce[d] a sufficient risk of

increasing the measure of punishment attached to the covered crime[.]" *Morales*, 514 U.S. at 509. Far from the purely "conjectural effects" presented in *Morales, id.*, the effect of the retroactive application of section 3583(h) to Mr. Johnson was direct and certain. His post-revocation punishment exceeded by six months the maximum possible post-revocation sanction he could have received under the pre-amendment version of section 3583(e)(3). The actual "risk" of increased punishment for his underlying crime of conviction was, in effect, one hundred percent.

3. Respondent has argued that section 3583(h) does not violate the Ex Post Facto Clause because its application does not actually change the law. *See* Cert. Opp. 7-8. Respondent specifically relies on the construction of the pre-amendment section 3583(e)(3) adopted by two of the circuit courts of appeals (the First and Eighth Circuits) and rejected by nine others (the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits), *see supra* notes 3 and 4, for the contention that "subsection (h) reaffirmed a power that already existed under prior law." Cert. Opp. 8. This argument must fail for three reasons.

First, the law of the Sixth Circuit at the time of Mr. Johnson's underlying crime prohibited reimposition of another term of supervised release following revocation. *See United States v. Truss*, 4 F.3d 437, 439 (6th Cir. 1993) ("no additional term of supervised release is permitted by section 3583(e)(3)"). As a result, the enactment of section 3583(h) empowered district courts in the Sixth Circuit to impose sanctions for supervised release violations of a type and duration they previously had no ability to

impose under prior circuit law. Mr. Johnson, who challenges section 3583(h) *as it has been applied to him in the Sixth Circuit*, confronts a legal regime that clearly changed after he was convicted of and sentenced for his underlying crime. In fact, the Sixth Circuit recognized as much in *United States v. Page*, 131 F.3d 1173 (6th Cir. 1997), its leading case rejecting an Ex Post Facto Clause challenge to the retroactive application of section 3583(h).[11] According to the court in *Page*, "Congress, in effect, superseded this court's opinion in *United States v. Truss* by enacting section 3583(h)." *Id.* at 1174.

Second, the basic predicate of Respondent's argument is incorrect. The pre-amendment version of section 3583 (e)(3) was clear and simply did not permit a district court to impose subsequent supervised release terms after revoking the original supervised release term. Subsection (a) was the only part of the statute that empowered the court to impose a supervised release term, and it was expressly limited to the time of sentencing for the original offense. Subsection (e) provided a disjunctive list of options available to the district court for changing or revoking a supervised release term; this list, because it provided options separated by the disjunctive "or," presented discrete and separate alternatives. Under subsection (e)(3) the district court could "revoke" supervised release and order that the defendant be reimprisoned. As the Fifth Circuit cogently explained in *United States v. Holmes*,

---

[11] The Sixth Circuit cited *Page* in its unpublished decision in the case at bar. J.A. 49.

> " 'revoke' generally means to cancel or rescind. Once a term of supervised release has been revoked under § 3583(e)(3), there is nothing left to extend, modify, reduce or enlarge under § 3583(e)(2). The term of release no longer exists."

954 F.2d 270, 272-73 (5th Cir. 1992). In other words, "the revocation and extension options were by their very nature mutually exclusive" under the pre-amendment version of section 3583, and neither provided for reimposition of supervised release.[12] *Id.*

Third, the fact that Congress amended section 3583 by adding an entirely new subsection effectively forecloses Respondent's theory. As Respondent noted in its brief in opposition to certiorari, although this Court had not decided whether section 3583(e)(3) empowered the district courts to impose a term of post-reimprisonment supervised release (Cert. Opp. 8), an overwhelming majority of the courts of appeals had decided that the pre-amendment section 3583(e)(3) does not give the district courts any such power. By enacting subsection (h) however, Congress changed the substantive law and provided, for the first time, the authority to impose additional supervised release following revocation. As with any amendment or enactment of law, such change is to be

---

[12] If there were any doubt about the district court's power to impose successive supervised release terms under the prior statute, that doubt should be resolved, under the rule of lenity, in favor of more limited sentencing power. *See Bifulco v. United States*, 447 U.S. 381, 387, 400 & n.17 (1980) (applying rule of lenity to sentencing statute).

applied prospectively. And, as this Court has explained, such a legislative overruling

> does not, by itself, reveal whether Congress intends the "overruling" statute to apply retroactively to events that would otherwise be governed by the judicial decision. A legislative response does not necessarily indicate that Congress viewed the judicial decision as "wrongly decided" as an interpretive matter. Congress may view the judicial decision as an entirely correct reading of prior law – or it may be altogether indifferent to the decision's technical merits – but may nevertheless decide that the old law should be amended, but only for the future.

Rivers v. Roadway Express, Inc., 511 U.S. 298, 304-05 (1994) (footnote omitted). Given the extent to which "[t]he presumption against retroactive application of new laws . . . ' is deeply rooted in our jurisprudence,' " *Lynce*, 519 U.S. at 439 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994)), the Court should reject any effort by Respondent to argue that section 3583(h) merely clarified, rather than changed, pre-existing law.

4. Respondent contends that application of section 3583(h) to Mr. Johnson does not violate the Ex Post Facto Clause because "he may have benefitted from its application to his case." Cert. Opp. 8. According to Respondent, "[t]he option afforded under Section 3583(h) for the district court to order offenders like [Mr. Johnson] to serve shorter terms in prison to be followed by supervised release, rather than potentially lengthier terms of prison

alone, reduces any ex post facto concerns in the application of Section 3583(h)." *Id.* at 9. This argument is without merit.

First, Respondent is simply incorrect as a matter of fact. When the district court revoked Mr. Johnson's original supervised release term, it imposed as a sanction a sentence six months longer than the maximum sentence it could have imposed under the law in effect in the Sixth Circuit at the time of Mr. Johnson's conviction, and imposed a type of punishment – a supervised release "tail" – not contemplated by subsection (e)(3). Clearly, Mr. Johnson did not benefit by this extra six months of punishment. Furthermore, this Court's decisions in *Lindsey* and *Miller* foreclose any argument that, in order to prevail, Mr. Johnson must show that the district court would *not* have reimprisoned him for more than 1½ years if it had been constrained to apply section 3583(e)(3). In *Miller*, the Court rejected the contention "that the [challenged] change in guidelines laws is not disadvantageous because the petitioner 'cannot show definitively that he would have gotten a lesser sentence.' " 482 U.S. at 432. According to the Court,

> *Lindsey* establishes "that one is not barred from challenging a change in the penal code on ex post facto grounds simply because the sentence he received under the new law was not more onerous than that which he might have received under the old."

Id. (quoting *Dobbert v. Florida*, 432 U.S. 282, 300 (1977)). There is no cause for the Court to depart from that settled principle in this case.

Second, the contention that Mr. Johnson benefits from the sanction imposed rests on unsupportable grounds. The premise for such an argument is that more supervised release is better than less incarceration. However, the courts of appeals have recognized, for Ex Post Facto Clause purposes, that loss of liberty entailed by a lengthier term of supervised release has independent constitutional significance: "Supervised release is punishment; it is a deprivation of some portion of one's liberty imposed as a punitive measure for a bad act." *United States v. Dozier*, 119 F.3d 239, 242 (3d Cir. 1997); *see also United States v. Eske*, 189 F.3d 536, 539-40 (7th Cir. 1999) (striking down retroactive application of 3583(h) because it "equal[ed] three years of restraint on the defendant's freedom versus two years possible under the old statute – clearly a new burden upon Eske he could not have anticipated when his crime was committed"); *United States v. Collins*, 118 F.3d 1394, 1397 (9th Cir. 1997) ("Three years of restriction may reasonably be viewed on its face as a more onerous penalty than two years of restriction.").

Furthermore, Respondent's argument rests on the presumption that there is no ex post facto violation where a legislature retroactively imposes a longer sentence for a crime so long as the conditions of the lengthier confinement are arguably less harsh. Under such a theory, Congress could retroactively increase the prison sentence for a crime so long as it also required that the additional time be served in a less restrictive facility, *e.g.*, a minimum security facility rather than a maximum security facility. Such is not the law. This Court has repeatedly emphasized that the key question in a case such as this is

whether the *quantum* of punishment has been retroactively increased. *See Lynce*, 519 U.S. at 442 (essential inquiry was "whether the cancellation of 1860 days of accumulated provisional credits had the effect of lengthening petitioner's period of incarceration"); *Morales*, 514 U.S. 513 ("Such a prisoner's ultimate date of release would be entirely unaffected by the change in the timing of suitability hearings."); *Weaver*, 450 U.S. at 33 (precluding retroactive application of statute that "[b]y definition . . . lengthens the period that someone in petitioner's position must spend in prison"). Where sentences as a whole have been made lengthier by retroactive legislation, this Court has consistently set those sentences aside as unconstitutional.

C. Retroactive Application Of Section 3583(h) Violates The Fundamental Interests That The Ex Post Facto Clause Is Designed To Protect.

At least three important public policies underlie the Ex Post Facto Clause: (1) to give the public fair warning of and reliance upon the criminal law, *see Miller*, 482 U.S. at 430; *Weaver*, 450 U.S. at 28; (2) to restrain government from enacting arbitrary legislation, *see Miller*, 482 U.S. at 429; *Weaver*, 450 U.S. at 29; and (3) to maintain the separation of powers, *see Weaver*, 450 U.S. at 29 n.10. Application of section 3583(h) to Mr. Johnson flouts each of these policies.

Most significantly, the retroactive application of section 3583(h) to extend the term of Mr. Johnson's punishment beyond that which could have been imposed under the pre-amendment section 3583(e)(3) violates principles

of reliance and fair warning that necessarily undergird any system that includes plea bargaining. As this Court observed in *Lynce*, the Ex Post Facto Clause expressly protects a "defendant engaged in negotiations that may lead to an acknowledgment of guilt and a suitable punishment."[13] 519 U.S. at 440. Mr. Johnson pleaded guilty to the underlying crime of conviction in this case. J.A. 4-6. Such a plea must be voluntary and knowing: under Federal Rule of Criminal Procedure 11(c)(1), the district court was required to inform Mr. Johnson of, among other things, "the maximum possible penalty provided by law, including the effect of any special parole or supervised release term." Fed. R. Crim. P. 11(c)(1); *see also Hill v. Lockhart*, 474 U.S. 52 (1985). In determining whether to enter a plea, Mr. Johnson was entitled to take into account the magnitude of the punishment for the crime as it then existed with the confidence that the punishment would not be enlarged after the fact. Retroactive application of section 3583(h) to Mr. Johnson to enlarge his punishment by six months thus is a "bait and switch" scheme that defeats Mr. Johnson's reasonable expectations concerning his punishment without the constitutionally required fair warning.

---

[13] As one commentator has noted, "[t]he vast majority of federal criminal cases are handled by plea bargain." *Risking Retroactive Punishment*, *supra* note 6, at 1577. In the plea bargaining setting, which assumes knowing negotiation by rational actors, "the interaction between the government and the defendant takes on all the trappings of a 'bargain,' with the criminal defendant well aware of both the ramifications of his plea and his opportunities for early release or lenient treatment." *Id.*

Retroactive application of section 3583(h) to Mr. Johnson is also unconstitutionally arbitrary and vindictive. The punishment for his crime was actually expanded by six months beyond the longest sanction the district court could have imposed under the pre-amendment version of section 3583(e)(3). There is no justification for lengthening Mr. Johnson's punishment beyond the limit imposed by the statute in effect at the time of his conviction, other than the reason posed by Respondent: it is possible to do so with application of subsection (h). Such a "reason" however, is not a valid explanation or exercise of the legislature's power.[14] Finally, the application of section 3583(h) to Mr. Johnson violates basic separation of powers principles by granting to Congress the power to determine the retroactive effect of penal laws, thereby usurping the role of the Judiciary and the Executive. *See Weaver*, 450 U.S. at 29 n.10.

II. THE COURT OF APPEALS ERRONEOUSLY VIEWED PETITIONER'S POST-REVOCATION REIMPRISONMENT AND SECOND SUPERVISED RELEASE AS PUNISHMENT FOR A POST-AMENDMENT CRIME.

The court of appeals rejected Mr. Johnson's challenge to the application of section 3583(h). J.A. 48-49 (stating

---

[14] *See Calder*, 3 U.S. (3 Dal.) At 389 (English ex post facto laws "were stimulated by ambition or personal resentment, and vindictive malice"); *Risking Retroactive Punishment*, *supra* note 6, at 1579 ("Where the legislature has passed a law that heaps extra punishments on politically weak constituencies such as felony convicts, there is the risk that this is done for no other reason than to curry favor with voters and ensure reelection. Indeed, it was just this sort of self-interested, ambitious behavior that the *Calder* Court warned against.").

that "the application of § 3583(h) does not violate the Ex Post Facto Clause," citing *United States v. Page*, 131 F.3d 1173 (6th Cir. 1997), and *United States v. Abbington*, 144 F.3d 1003 (6th Cir.), *cert. denied*, 119 S. Ct. 344 (1998). In *Page* and *Abbington*, the court reached the same result, finding no ex post facto violation for the same reason – that section 3583(h) is not "retrospective" for ex post facto purposes. According to the Sixth Circuit,

> section 3583(h) was passed before [the defendants] violated the terms of their supervised release, which precipitated their current sentences. . . . [S]ection 3583(h) does not alter the punishment for defendants' original offenses; section 3583(h) instead imposes punishment for defendants' new offenses for violating the conditions of their supervised release – offenses they committed after section 3583(h) was passed.

Page, 131 F.3d at 1175-76; *Abbington*, 144 F.3d at 1005 (quoting *Page*).

The Sixth Circuit's analysis grossly oversimplifies the issues in these cases for several reasons. First, as illustrated by the foregoing discussion, any order of incarceration or reimposition of supervised release, upon revocation of the original term of supervised release, is not governed by the supervised release violation itself. Instead, the punishment is a function of the terms and conditions subsequent that were set forth at the time of the original sentence for the underlying offense. An analogy to basic tenets of contract law demonstrates this concept. Where a contract establishes and defines a condition subsequent (*e.g.*, maintenance of a particular sales

rate), as well as the consequences of a breach of that condition (*e.g.*, a specific monetary penalty), the party aggrieved by the breach of the condition subsequent cannot, *post hoc*, increase the amount of penalty to be imposed as a consequence of the breach. When the parties agreed to the contract, just as when Mr. Johnson entered into a plea agreement with an understanding of the specific and conditional penalties to be imposed, the bargain was made, fair warning was given and he was entitled to rely upon the terms as they existed at that time. Imposition of a unilateral, *post hoc* change in Mr. Johnson's sentence, as in the contract arena, is both arbitrary and unfair. *See Weaver*, 450 U.S. at 30; *see also See Risking Retroactive Punishment*, *supra* note 6, at 1561; Ryan M. Zenga, Note, *Retroactive Law or Punishment for a New Offense? The Ex Post Facto Implications of Amending the Statutory Provision Governing Violations of Supervised Release*, 19 W. New Eng. L. Rev. 499, 500, 525-41 (1997).

Furthermore, the text and structure of section 3583 compel the conclusion that, when supervised release is revoked and an additional term of prison and/or supervised release is imposed, the sentence being executed is the sentence for the original crime of conviction. Additional prison time and reimposition of supervised release terms are *not* punishments for the later violation of the original supervised release term. This is especially clear in the case, such as here, where the violation stems from a criminal act because such criminal act is separately punished under the relevant criminal code. Second, the contrary conclusion raises serious Due Process and Double Jeopardy problems. *See supra* Section I.A. The court of appeals' analysis of the issue in this case cannot be

squared with the text of section 3583 or this Court's Ex Post Facto Clause jurisprudence.

CONCLUSION

For the foregoing reasons, Mr. Johnson respectfully requests that the judgment of the United States Court of Appeals for the Sixth Circuit be reversed.

Respectfully submitted,

JEFFREY T. GREEN
JOSEPH S. MILLER
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Of Counsel

LEAH J. PREWITT
RITA LALUMIA*
DAVID F. NESS
FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.
707 Georgia Avenue, Suite 203
Chattanooga, Tennessee 37402
(423) 756-4349

Counsel for Petitioner
Cornell Johnson

**Counsel of Record*

December 2, 1999

STATUTORY APPENDIX

The *pre-amendment* version of 18 U.S.C. § 3583 was as follows:

§ 3583. Inclusion of a term of supervised release after imprisonment

(a) In general. – The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute.

(b) Authorized terms of supervised release. – Except as otherwise provided, the authorized terms of supervised release are –

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

(c) Factors to be considered in including a term of supervised release. – The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section

3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), and (a)(6).

(d) Conditions of supervised release. – The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision and that the defendant not possess illegal controlled substances. The court may order, as a further condition of supervised release, to the extent that such condition –

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

(e) Modification of conditions or revocation. – The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), and (a)(6) –

(1) terminate a term of supervised release and discharge the person released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the person released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the person to serve in prison all or part of the term of supervised release without credit for time previously served on postrelease supervision, if it finds by a preponderance of the evidence that the person violated a condition of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure that are applicable to probation revocation and to the

provisions of applicable policy statements issued by the Sentencing Commission, except that a person whose term is revoked under this paragraph may not be required to serve more than 3 years in prison if the offense for which the person was convicted was a Class B felony, or more than 2 years in prison if the offense was a Class C or D felony; or

(4) order the person to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

(f) Written statement of conditions. – The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

(g) Possession of controlled substances. – If the defendant is found by the court to be in the possession of a controlled substance, the court shall terminate the term of supervised release and require the defendant to serve in prison not less than one-third of the term of supervised release.

The *post-amendment* version of 18 U.S.C. § 3583 is as follows:

§ 3583. Inclusion of a term of supervised release after imprisonment

(a) In general. – The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

(b) Authorized terms of supervised release. – Except as otherwise provided, the authorized terms of supervised release are –

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

(c) Factors to be considered in including a term of supervised release. – The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section

3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), and (a)(6).

(d) Conditions of supervised release. – The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person described in section 4042(c)(4), that the person report the address where the person will reside and any subsequent change of residence to the probation officer responsible for supervision, and that the person register in any State where the person resides, is employed, carries on a vocation, or is a student (as such terms are defined under section 170101(a)(3) of the Violent Crime Control and Law Enforcement Act of 1994). The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The

condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4). The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition –

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

(e) Modification of conditions or revocation. – The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), and (a)(6) –

(1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

(f) Written statement of conditions. – The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a

guide for the defendant's conduct and for such supervision as is required.

(g) Mandatory revocation for possession of controlled substance or firearm or for refusal to comply with drug testing. – If the defendant –

(1) possesses a controlled substance in violation of the condition set forth in subsection (d);

(2) possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm; or

(3) refuses to comply with drug testing imposed as a condition of supervised release;

the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

(h) Supervised release following revocation. – When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term of imprisonment authorized under subsection (e)(3), the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised

release, less any term of imprisonment that was imposed upon revocation of supervised release.

(i) Delayed revocation. – The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

Jan 10 2000

(6)

Supreme Court, U.S.
FILED
JAN 10 2000
CLERK

No. 99-5153

In the Supreme Court of the United States

CORNELL JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Solicitor General
Counsel of Record
JAMES K. ROBINSON
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
PAUL R.Q. WOLFSON
Assistant to the Solicitor General
RICHARD A. FRIEDMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

BEST AVAILABLE COPY

64pp

QUESTION PRESENTED

Whether the Ex Post Facto Clause precluded the district court, upon revoking petitioner's supervised release, from ordering petitioner, under 18 U.S.C. 3583(h), to serve a term of reimprisonment followed by additional supervised release outside prison.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Constitutional and statutory provisions involved	1
Statement	2
Summary of argument	14
Argument:	
The district court's order under 18 U.S.C. 3583(h) requiring petitioner to serve a renewed period of supervised release outside prison after his period of reincarceration does not violate the Ex Post Facto Clause	17
A. Even before Section 3583(h) was enacted, district courts had the authority, when revoking supervised release, to order an offender to serve a renewed period of supervised release outside prison after a period of reincarceration	17
1. In determining the state of the law before Section 3583(h) was enacted, this Court should make an independent construction of Section 3583(e), rather than accept the Sixth Circuit's prior construction as controlling	18
2. Section 3583(e) as in effect at the time of petitioner's offense authorized the district court to order reincarceration followed by renewed supervised release	23
a. The text of Section 3583(e)	24
b. The purpose of supervised release	26
c. Background of supervised release	32

Table of Contents—Continued: Page

B. If the court concludes that Section 3583(e)(3) did not authorize a renewed term of supervised release, then the entire sanction imposed on petitioner for violating supervised release should be vacated and the case remanded for further proceedings 35
1. The application of a new statute that raises the maximum possible penalty but does not raise the minimum possible penalty or narrow the district court's discretion to impse that minimum penalty may not violate the Ex Post Facto Clause where the offender is sentenced within the range authorized under prison law 36
2. The actual sanction imposed on petitioner following revocation of his supervised release cannot confidently be said to be less onerous than that available under prior law 42
3. If application of Section 3583(h) to petitioner violated the Ex Post Facto Clause, the proper remedy is a remand for the district court to apply former Section 3583(e) to petitioner 46
Conclusion 46
Appendix A 1a
Appendix B 5a

TABLE OF AUTHORITIES

Cases:

Artuso v. *Hall*, 74 F.3d 68 (5th Cir. 1996) 34
Billis v. *United States*, 83 F.3d 209 (8th Cir.), cert. denied, 519 U.S. 900 (1996) 34
Bouie v. *City of Columbia*, 378 U.S. 347 (1964) 22

Cases—Continued: Page

Bousley v. *United States*, 523 U.S. 614 (1998) 20
Brown v. *GSA*, 425 U.S. 820 (1976) 34
California Dep't of Corrections v. *Morales*, 514 U.S. 499 (1995) 42, 45
Chapman v. *California*, 386 U.S. 18 (1967) 42
Cisneros v. *Alpine Ridge Group*, 508 U.S. 10 (1993) 21
Deal v. *United States*, 508 U.S. 129 (1993) 24
Evans v. *United States Parole Comm'n*, 78 F.3d 262 (7th Cir. 1996) 34
Fowler v. *United States Parole Comm'n*, 94 F.3d 835 (3d Cir. 1996) 34
Gozlon-Peretz v. *United States*, 498 U.S. 395 (1991) 11
Lindsey v. *Washington*, 301 U.S. 397 (1937) 37, 38, 40
Lockhart v. *Fretwell*, 506 U.S. 364 (1993) 21
Lynce v. *Mathis*, 519 U.S. 433 (1997) 17, 35, 38, 39
Marks v. *United States*, 430 U.S. 188 (1977) 22
Memoirs v. *Massachusetts*, 383 U.S. 413 (1966) 22
Miller v. *California*, 413 U.S. 15 (1973) 22
Miller v. *Florida*, 482 U.S. 423 (1987) 38, 39
Moody v. *Daggett*, 429 U.S. 78 (1976) 43
Rivers v. *Roadway Express, Inc.*, 511 U.S. 298 (1994) 19, 20
Robles v. *United States*, 146 F.3d 1098 (9th Cir. 1998) 34
State v. *Callahan*, 109 La. 946 (1903) 40
Tome v. *United States*, 513 U.S. 150 (1995) 43
United States v. *Barton*, 26 F.3d 490 (4th Cir. 1994) 7
1994) 43
United States v. *Behnezhad*, 907 F.2d 896 (9th Cir. 1990) 7
United States v. *Boling*, 947 F.2d 1461 (10th Cir. 1991) 8
United States v. *Brady*, 88 F.3d 225 (3d Cir. 1996), cert. denied, 519 U.S. 1094 (1997) 37
United States v. *Cooper*, 962 F.2d 339 (4th Cir. 1992) 7, 30

Cases—Continued: Page

United States v. *Davis*, 151 F.3d 1304 (10th Cir. 1998) 11
United States v. *Davis*, 187 F.3d 528 (6th Cir. 1999) 31
United States v. *Edgin*, 92 F.3d 1044 (10th Cir. 1996), cert. denied, 519 U.S. 1069 (1997) 27
United States v. *Eng*, 14 F.3d 165 (2d Cir.), cert. denied, 513 U.S. 807 (1994) 3
United States v. *Feinberg*, 631 F.2d 388 (5th Cir. 1980) 11
United States v. *Garcia*, 112 F.3d 395 (9th Cir. 1997) 3
United States v. *Good*, 25 F.3d 218 (4th Cir. 1994) 3
United States v. *Holmes*, 954 F.2d 270 (5th Cir. 1992) 7
United States v. *Kelly*, 974 F.2d 22 (5th Cir. 1992) 3
United States v. *Koehler*, 973 F.2d 132 (2d Cir. 1992) 7
United States v. *Lanier*, 520 U.S. 259 (1997) 22
United States v. *LeMay*, 952 F.2d 995 (8th Cir. 1991) 3
United Statees v. *Malesic*, 18 F.3d 205 (3d Cir. 1994) 7
United States v. *McGee*, 981 F.2d 271 (7th Cir. 1992) 7
United States v. *Morales*, 45 F.3d 693 (2d Cir. 1995) 43
United States v. *Neville*, 985 F.2d 992 (9th Cir.), cert. denied, 508 U.S. 943 (1993) 43
United States v. *O'Neil*, 11 F.3d 292 (1st Cir. 1993) 7, 24, 25, 32, 33
United States v. *Orozco-Rodriguez*, 60 F.3d 705 (10th Cir. 1995) 3
United States v. *Page*, 131 F.3d 1173 (6th Cir. 1997), cert. denied, 119 S. Ct. 77 (1998) 13, 17
United States v. *Robinson*, 106 F.3d 610 (4th Cir. 1997) 34
United States v. *Rockwell*, 984 F.2d 1112 (10th Cir.), cert. denied, 508 U.S. 966 (1993) 7, 8
United States v. *Rodgers*, 466 U.S. 475 (1984) 22
United States v. *Schechter*, 13 F.3d 1117 (7th Cir. 1994) 27

Cases—Continued: Page

United States v. *Schrader*, 973 F.2 623 (8th Cir. 1992) 7, 8
United States v. *Shorty*, 159 F.3d 312 (7th Cir. 1998), cert. denied, 119 S. Ct. 2024 (1999) 3
United States v. *St. John*, 92 F.3d 761 (8th Cir. 1996) 20
United States v. *Tatum*, 998 F.2d 893 (11th Cir. 1993) 7, 8
United States v. *Truss*, 4 F.3d 437 (6th Cir. 1993) 7, 8, 19, 23, 24
United States v. *Williams*, 2 F.3d 363 (11th Cir. 1993) 8, 23
United States v. *Withers*, 128 F.3d 1167 (7th Cir. 1997), cert. denied, 119 S. Ct. 79 (1998) 45
United States Parole Comm'n v. *Williams*, 54 F.3d 820 (D.C. Cir. 1995) 32, 34
Weaver v. *Graham*, 450 U.S. 24 (1981) 18, 37, 38, 39

Constitution, statutes, regulations and rules:

U.S. Const. Art. I, § 9, Cl. 3 (Ex Post Facto Clause) ..... *passim*
Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Tit. VII, § 7108(b), 102 Stat. 4419 6
Comprehensive Crime Control Act of 1984, Pub. L.. No 98-473, Tit. II, § 212(a)(2), 98 Stat. 1999 2
Narcotics Penalties and Enforcement Act of 1986, Pub. L. No. 99-570, Tit. I, § 1006(a)(1), 100 Stat. 3207-6 6
Sentencing Act of 1987, Pub. L. No. 100-182, § 25, 101 Stat. 1272 6
Public Safety and Recreational Firearm Use Protection Act, Pub. L. No. 103-322, Tit. XI, 108 Stat. 2016:
§ 110505, 108 Stat. 2016 25
§ 110505, 108 Stat. 2016-2017 6
§ 110505, 108 Stat. 2017 ..... 9, 25
18 U.S.C. 1001 22
18 U.S.C. 1029(b)(2) 10
18 U.S.C. 1029(c)(1)(A)(i) 10
18 U.S.C. 3553 4
18 U.S.C. 3559(a) 3

Statutes, regulations and rules—Continued:	Page
18 U.S.C. 3559(a)(4)	10
18 U.S.C. 3563(b)	4
18 U.S.C. 3563(b)(14)	4
18 U.S.C. 3583	1, 3, 4
18 U.S.C. 3583 (1988 & Supp. IV 1992)	1, 1a
18 U.S.C. 3583(a)	2, 36
18 U.S.C. 3583(b)	3, 10, 29, 30, 37
18 U.S.C. 3583(d)	4
18 U.S.C. 3583(e) (1988 & Supp. IV 1992)	2, 5, 7, 9, 10, 19, 20, 21, 22
18 U.S.C. 3583(e)(1)	24, 27, 28, 30
18 U.S.C. 3583(e)(2) (1988 & Supp. IV 1992)	27, 30, 45
18 U.S.C. 3583(e)(3) (1988 & Supp. IV 1992)	*passim*
18 U.S.C. 3583(e)(4)	6
18 U.S.C. 3583(g) (1988 & Supp. IV 1992)	9, 25
18 U.S.C. 3583(h)	*passim*
18 U.S.C. 3603(2)	11
18 U.S.C. 3653 (1982)	32
21 U.S.C. 841(a)(1)	30
21 U.S.C. 841(b)(1)(A)	3
21 U.S.C. 841(b)(1)(B)	3
21 U.S.C. 841(b)(1)(C) (1994 & Supp. III 1997)	3
21 U.S.C. 841(b)(1)(D) (1994 & Supp. III 1997)	3
21 U.S.C. 841(c) (1982)	32, 33
28 C.F.R. 2.57(c) (1984)	34
28 C.F.R.:	
Section 2.52 App.	32
Section 2.57(a)	33
Fed. R. Crim. P.:	
Rule 32.1(a)	27
Rule 32.1(b)	27
Rule 52.(a)	42
United States Sentencing Guidelines:	
§ 7B1.3(a)(1)	12
§ 7B1.4	12
Miscellaneous:	
Black's Law Dictionary (6th ed. 1990)	24
S. Rep. No. 225, 98th Cong., 1st Sess. (1983)	4, 33

In the Supreme Court of the United States

No. 99-5153

CORNELL JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The order of the court of appeals (J.A. 48-49) is unpublished, but the decision is noted at 181 F.3d 105 (Table).

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1999. The petition for a writ of certiorari was filed on July 2, 1999, and was granted on October 18, 1999. J.A. 50. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Ex Post Facto Clause of the United States Constitution, Article I, Section 9, Clause 3, provides that "[n]o * * * ex post facto Law shall be passed" by Congress.

Reproduced in Appendix A to this brief is the version of 18 U.S.C. 3583 in effect on October 22, 1993, when petitioner committed his offense. Appendix B reproduces the version of 18 U.S.C. 3583 in effect on April 30, 1998, when the district

court revoked petitioner's supervised release, and also currently in effect.[1]

STATEMENT

After his three-year term of supervised release was revoked by the United States District Court for the Eastern District of Tennessee, petitioner was ordered to serve 18 months in prison, followed by another 12 months on supervised release. Petitioner also lost all credit for the time he had already spent outside prison on supervised release. J.A. 38-41. The court of appeals affirmed. J.A. 48-49.

1. a. This case involves a claim that the Ex Post Facto Clause precluded the district court, on revoking petitioner's supervised release, from ordering petitioner, under 18 U.S.C. 3583(h), to serve a term of reimprisonment followed by additional supervised release outside prison. Section 3583(h) was enacted by Congress after the date of petitioner's offense, October 22, 1993. Accordingly, it is necessary to compare the pertinent statutes as they were in effect on the date of petitioner's offense and on the date on which his supervised release was revoked, April 30, 1998.

b. Supervised release was introduced into the federal criminal justice system as part of the Sentencing Reform Act of 1984. See Pub. L. No. 98-473, Tit. II, § 212(a)(2), 98 Stat. 1999. The Sentencing Reform Act provides that a district court, "in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment." 18 U.S.C. 3583(a). The statute sets forth maximum permissible periods of supervised release, generally connected to the

[1] Unless otherwise indicated, all citations in this brief to Title 18 of the United States Code without further edition information are to the version in effect on April 30, 1998. Citations in this brief to 18 U.S.C. 3583 as in effect on the date of petitioner's offense are set forth as 18 U.S.C. 3583 (1988 & Supp. IV 1992).

class of the offense for which the defendant was convicted, see 18 U.S.C. 3583(b);[2] the class of the offense in turn is defined by the maximum term of imprisonment authorized by statute for the offense, see 18 U.S.C. 3559(a). Although supervised release is therefore part of an offender's criminal sentence, and the duration of the term of supervised release is tied to the seriousness of the offense, the "primary goal" of supervised release is nonetheless not punishment, but rather "to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs

[2] Under Section 3583, as in effect both at the time of petitioner's offense and at present, an offender convicted of a Class A or Class B felony is subject to a maximum supervised release term of five years; one convicted of a Class C or Class D felony is subject to a maximum supervised release term of three years; and one convicted of a Class E felony or misdemeanor (other than a petty offense) is subject to a maximum supervised release term of one year. See 18 U.S.C. 3583(b).

There is an important exception that is not at issue in this case. Certain narcotics offenses defined in Title 21 require *minimum* terms of supervised release. See, *e.g.*, 21 U.S.C. 841(b)(1)(A) (flush paragraph) (minimum terms of five and ten years' supervised release); 21 U.S.C. 841(b)(1)(B) (flush paragraph) (minimum terms of four and eight years' supervised release); 21 U.S.C. 841(b)(1)(C) (1994 & Supp. III 1997) (flush paragraph) (minimum terms of three and six years' supervised release); 21 U.S.C. 841(b)(1)(D) (1994 & Supp. III 1997) (minimum terms of two and four years' supervised release). The courts of appeals have reached differing conclusions as to whether and in what circumstances those provisions requiring "at least" the specified minimum terms of supervised release might override the maximum periods set forth in Section 3583(b) and authorize a maximum of life supervised release. Compare *United States* v. *Good*, 25 F.3d 218, 220-221 (4th Cir. 1994), and *United States* v. *Kelly*, 974 F.2d 22, 24 (5th Cir. 1992), with *United States* v. *LeMay*, 952 F.2d 995, 998 (8th Cir. 1991), *United States* v. *Eng*, 14 F.3d 165, 172-173 (2d Cir.), cert. denied, 513 U.S. 807 (1994), *United States* v. *Orozco-Rodriguez*, 60 F.3d 705, 707-708 (10th Cir. 1995), and *United States* v. *Garcia*, 112 F.3d 395, 397- 398 (9th Cir. 1997); see also *United States* v. *Shorty*, 159 F.3d 312, 316 n.6 (7th Cir. 1998), cert. denied, 119 S. Ct. 2024 (1999).

after release." S. Rep. No. 225, 98th Cong., 1st Sess. 124 (1983).

Section 3583 requires the district court to impose, as a condition of supervised release, a requirement that the offender not commit any federal, state, or local crime during the term of supervision. 18 U.S.C. 3583(d).[3] Congress also granted the district court authority to impose certain discretionary conditions on an offender's supervised release (generally those also authorized as discretionary conditions of probation),[4] to the extent that such conditions satisfy certain policy objectives identified in the Sentencing Reform Act as proper sentencing factors.[5] 18 U.S.C. 3583(d). In addition to those discretionary conditions, Section 3583(d) permits the court to impose "any other condition it considers to be appropriate." 18 U.S.C. 3583(d).

---

[3] Congress has also required that the offender not unlawfully possess any controlled substance. 18 U.S.C. 3583(d).

[4] Section 3583(d) identified permissible discretionary conditions of supervised release by cross-referencing some of the discretionary conditions authorized for probation under 18 U.S.C. 3563(b). One permissible condition of probation (and, by cross-reference, supervised release as well) is that the offender "remain within the jurisdiction of the court, unless granted permission to leave by the court or a probation officer." 18 U.S.C. 3563(b)(14).

[5] Under Section 3583(d), a discretionary condition of supervised release is authorized to the extent that such a condition "(1) is reasonably related to the factors set forth in section 3553(a)(1) ['the nature and circumstances of the offense and the history and characteristics of the defendant'], (a)(2)(B) ['to afford adequate deterrence to criminal conduct'], (a)(2)(C) ['to protect the public from further crimes of the defendant'], and (a)(2)(D) ['to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner']; (2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and (3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)." 18 U.S.C. 3583(d) (interpolating cross-referenced language of 18 U.S.C. 3553). Section 3553 sets forth factors that the court is to consider in determining the particular criminal sentence to be imposed in any case.

Congress also provided the district court with authority to review an offender's compliance with the conditions of a term of supervised release, and to adjust those conditions based on that review. Under Section 3583(e) as in effect at the time of petitioner's offense, a district court, based on its review of the offender's record of compliance, could take any of the following actions:

> (1) terminate a term of supervised release and discharge the person released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if [the court] is satisfied that such action is warranted by the conduct of the person released and the interest of justice;
>
> (2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and [the court] may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of the probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;
>
> (3) revoke a term of supervised release, and require the person to serve in prison all or part of the term of supervised release without credit for time previously served on postrelease supervision, if [the court] finds by a preponderance of the evidence that the person violated a condition of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure that are applicable to probation revocation and to the provisions of applicable policy statements issued by the Sentencing Commission, except that a person whose term is

revoked under this paragraph may not be required to serve more than 3 years in prison if the offense for which the person was convicted was a Class B felony, or more than 2 years in prison if the offense was a Class C or D felony;[6] or

(4) order the person to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

18 U.S.C. 3583(e) (1988 & Supp. IV 1992).

c. As noted above, Section 3583(e)(3) as it existed at the time of petitioner's offense authorized the district court to "revoke a term of supervised release, and require the person to serve in prison all or part of the term of supervised release without credit for time previously served on post-

[6] Section 3583(e)(3) was originally enacted as Section 3583(e)(4). An earlier Section 3583(e)(3), authorizing the district courts to treat a violation of supervised release as a contempt of court, was deleted before petitioner committed his offense. See Pub. L. No. 99-570, Tit. I, § 1006(a)(1), 100 Stat. 3207-6; Pub. L. No. 100-182, § 25, 101 Stat. 1272; Pub. L. No. 100-690, Tit. VII, § 7108(b), 102 Stat. 4419.

Congress initially placed no specific statutory cap on the permissible period of reimprisonment for Class A felony offenders. See Pub. L. No. 100-182, § 25, 101 Stat. 1272. All offenders were, however, always subject to the original, generally applicable limit that the term of reimprisonment be no greater than the offender's term of supervised release. See 18 U.S.C. 3583(e)(3) (1988 & Supp. IV 1992) (district court authorized to "require the person to serve in prison all or part of the term of supervised release"). In 1994, Congress enacted a five-year limitation on the permissible period of reimprisonment for Class A felony offenders. Pub. L. No. 103-322, Tit. XI, § 110505, 108 Stat. 2016-2017. Congress also at that time permitted the district court to order any defendant to serve in prison on all or part of the period of supervised release *authorized by statute* for his offense (as opposed to the term of supervised release actually imposed by the district court at the defendant's initial sentencing). *Ibid.*; see p. 9 n.8, *infra*.

release supervision" (subject to further maximum periods of reincarceration). The courts of appeals reached conflicting views on whether Section 3583(e) authorized a district court to order an offender who violated the conditions of his supervised release to serve a new period of supervised release following completion of any term of reincarceration imposed upon revocation of the initial term of supervised release. Some courts of appeals agreed with the government that, when a district court revoked an offender's initial term of supervised release, it could order the offender to serve time in prison and also, after the prison term, further time on supervised release. Other courts, however, concluded that, if a district court revoked a defendant's supervised release and ordered him to serve time in prison, the court was required to discharge him upon completion of the prison term without any further restraints on his liberty outside prison.[7]

A division of authority had already emerged by the time of petitioner's offense. The Sixth Circuit had ruled that "a district court does *not* have the power to impose an additional term of supervised release following a defendant's incarceration for violating the conditions of his original

[7] The First and Eighth Circuits ruled that sentencing courts had the power, upon revocation of supervised release, to order the person to serve part of the original term of supervised release in prison followed by continued supervised release, but other circuits disagreed and found no authority to order the person to serve continued supervised release after release from prison. Compare *United States* v. *O'Neil*, 11 F.3d 292, 293 (1st Cir. 1993), and *United States* v. *Schrader*, 973 F.2d 623, 625 (8th Cir. 1992), with *United States* v. *Koehler*, 973 F.2d 132, 134-136 (2d Cir. 1992), *United States* v. *Malesic*, 18 F.3d 205, 206 (3d Cir. 1994), *United States* v. *Cooper*, 962 F.2d 339, 341-342 (4th Cir. 1992), *United States* v. *Holmes*, 954 F.2d 270, 272-273 (5th Cir. 1992), *United States* v. *Truss*, 4 F.3d 437, 439 (6th Cir. 1993), *United States* v. *McGee*, 981 F.2d 271, 274-276 (7th Cir. 1992), *United States* v. *Behnezhad*, 907 F.2d 896, 898-899 (9th Cir. 1990), *United States* v. *Rockwell*, 984 F.2d 1112, 1116-1117 (10th Cir.), cert. denied, 508 U.S. 966 (1993), and *United States* v. *Tatum*, 998 F.2d 893, 895-896 (11th Cir. 1993).

release." *United States* v. *Truss*, 4 F.3d 437, 439 (1993). The Eighth Circuit, however, had already held that, "if a district court finds that an offender has violated the terms of his supervised release, the district court can * * * require the offender to serve a portion of the time remaining on the term of supervised release in prison and the remaining time on supervised release." *United States* v. *Schrader*, 973 F.2d 623, 625 (1992). The Tenth Circuit had already changed its position, first agreeing with the government, see *United States* v. *Boling*, 947 F.2d 1461 (1991), and then disagreeing, see *United States* v. *Rockwell*, 984 F.2d 1112, cert. denied, 508 U.S. 966 (1993). One panel of the Eleventh Circuit had disagreed with the government, see *United States* v. *Tatum*, 998 F.2d 893 (1993), but another panel, writing only two weeks later, agreed with the government, described the *Tatum* holding as "contrary to common sense," but accepted *Tatum* as binding precedent and declined to request en banc consideration because Congress was "in the process of curing the problem caused by the interpretation placed upon [Section 3583(e)(3)] by the several circuit courts of appeal," see *United States* v. *Williams*, 2 F.3d 363, 365 (1993).

d. To resolve the conflict among the courts of appeals over the district court's authority to impose both prison time and renewed supervised release upon revoking an offender's supervised release, Congress enacted Section 3583(h) on September 13, 1994. Section 3583(h) provides:

> When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term of imprisonment authorized under subsection (e)(3), the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

Pub. L. No. 103-322, Tit. XI, § 110505, 108 Stat. 2017. Section 3583(h) makes clear that, when a court revokes an offender's supervised release, it may order him to serve part of the term authorized for supervised release in prison and may *also* order him to serve further time on continued supervised release after he is released from reincarceration.[8] The limitations on that authority to order renewed supervised release following a period of reincarceration are that (a) the period of reincarceration imposed must be less than the maximum that could have been imposed, and (b) the total period of restraint on the offender's liberty following revocation of supervised release—the term of reimprisonment plus the term of renewed supervised release—must be no greater than the term of supervised release authorized by statute for the offense. In effect, Section 3583(h) makes clear that, when a court revokes a term of supervised release, it resets the conditions of supervised release as if *ab initio*, and may divide the period authorized by statute for

---

[8] In 1994, Congress also amended Section 3583(e)(3) to authorize the district court to order that an offender whose supervised release is revoked to serve in prison all or part of the term of supervised release "authorized by statute for the offense," rather than the term of supervised release initially imposed on a particular offender by the district court in its initial sentence. That change has no relevance for this case, because the term of supervised release imposed in petitioner's initial sentence, three years, was also the maximum authorized by statute for his offense.

Congress also amended an earlier version of Section 3583(g), which had required the district court to "terminate" an offender's supervised release if he is found to be in unlawful possession of a controlled substance. As amended, Section 3583(g) now requires the district court to "revoke," rather than "terminate," supervised release in such a case. Section 3583(g) also broadened the triggering circumstances for mandatory revocation of supervised release to include circumstances in which the defendant unlawfully possesses a firearm or refuses to comply with drug testing requirements. See 18 U.S.C. 3583(g).

supervised release between time in prison and time outside prison.[9]

2. a. On or about October 22, 1993—before Section 3583(h) was enacted—petitioner committed the offense of conspiracy to produce, use, and traffic in one or more counterfeit access devices, with intent to defraud, in violation of 18 U.S.C. 1029(b)(2). Petitioner's offense was a Class D felony.[10]

On March 8, 1994, after a guilty plea, petitioner was convicted of the conspiracy offense in the United States District Court for the Eastern District of Tennessee. J.A. 4-8. The district court sentenced petitioner to 25 months' imprisonment, to be followed by three years' supervised release (the maximum amount of supervised release permitted under Section 3583(b) for a Class D felony). J.A. 9-10. Among the conditions of petitioner's supervised release was a requirement that he not commit any federal, state, or local crime while on release (J.A. 10) and a requirement that petitioner not leave the judicial district without the permission of the court or the probation officer (J.A. 12).

Petitioner began to serve his sentence on the date of sentencing. He was released from imprisonment (after receiving good-conduct credits) on August 14, 1995, and upon release began to serve his three-year term of supervised release. Had petitioner not violated the conditions of his supervised release, it would have expired on August 13, 1998. J.A. 18.

On March 3, 1996, less than seven months after commencing his term of supervised release, petitioner was arrested in Virginia on state charges of fraud and uttering a

[9] Both before and after the 1994 amendments, Section 3583(e)(3) provided that a defendant whose supervised release is revoked loses credit for all time previously served on postrelease supervision.

[10] The penalty applicable to petitioner's conspiracy offense is prescribed in 18 U.S.C. 1029(b)(2) and (c)(1)(A)(i) as up to five years' imprisonment. That penalty classifies the conspiracy offense as a Class D felony. See 18 U.S.C. 3559(a)(4).

forged instrument. J.A. 18-19. Petitioner remained in state custody from the time of his arrest throughout his state trial. See J.A. 34. On July 25, 1996, petitioner was convicted of the state offenses of forgery and uttering a forged instrument, and on the following day he was convicted of the state offenses of obtaining money by false pretenses and larceny by false pretenses. J.A. 33-34. The state court sentenced him to terms of imprisonment of ten years for each of the first two offenses and one year for each of the latter two offenses, but suspended execution of nine years of the first ten-year sentence and nine and one-half years of the second ten-year sentence. *Ibid.*

On March 5, 1996, two days after petitioner's arrest on state charges in Virginia, the United States Probation Office filed a Petition for Warrant or Summons for Offender Under Supervision against petitioner, which was the first step toward revoking his supervised release.[11] J.A. 17-19. The violations of supervised release alleged in the petition were the commission of the Virginia offenses and leaving the Eastern District of Tennessee without permission. J.A. 18-19. A federal detainer was lodged in Virginia against peti-

[11] The district court may initiate a revocation proceeding on its own motion based on information obtained from any source. See *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 400-401 (1991) ("Under the Sentencing Reform Act's provisions for supervised release, the sentencing court, rather than the Parole Commission, would oversee the defendant's postconfinement monitoring."). The matter is usually initiated by the offender's probation officer, who has the responsibility to "keep informed, to the degree required by the conditions specified by the sentencing court, as to the conduct and condition of a probationer or a person on supervised release, who is under his supervision, and report his conduct and condition to the sentencing court." 18 U.S.C. 3603(2). The United States Attorney's Office usually participates in the proceeding, but there is no requirement that revocation of supervised release be initiated by the federal prosecutor. See *United States* v. *Davis*, 151 F.3d 1304, 1307 (10th Cir. 1998); *United States* v. *Feinberg*, 631 F.2d 388, 390-391 (5th Cir. 1980).

tioner, who remained in state custody until March 31, 1998, when he was released to federal authorities. J.A. 34.

The dispositional report prepared by the Probation Office for the hearing on the revocation of petitioner's supervised release noted that petitioner had been originally convicted of a Class D felony, and that he had a criminal history of category V. Under the pertinent statutory provision limiting the amount of time that the district court could order petitioner to serve in prison after revoking his supervised release, see 18 U.S.C. 3583(e)(3) (two years maximum reimprisonment for Class D felony), and non-binding Policy Statements issued by the Sentencing Commission addressing prison terms following revocation of supervised release, see Sentencing Guidelines §§ 7B1.3(a)(1), 7B1.4, petitioner was subject to a term of imprisonment following revocation of supervised release of 18-24 months. J.A. 31-32. The Probation Office's report also observed that the district court was authorized under Section 3583(h) to "reimpose supervised release after revocation, * * * provided that any term of imprisonment that the defendant is ordered to serve is less than the maximum term of imprisonment authorized by statute under [Section] 3583(e)(3)." J.A. 31-32.

On April 30, 1998, at a hearing on the revocation of his supervised release in the Eastern District of Tennessee before the original sentencing judge, petitioner admitted the alleged violations of his supervised release. J.A. 21-22. The district court thereupon revoked petitioner's supervised release. The court noted that, under the Sentencing Commission's Policy Statements, the term of imprisonment applicable to petitioner's case was 18-24 months. J.A. 23. The court also remarked that "there is a need, at least a short one, to protect the public from the kind of activity that [petitioner has] engaged in." J.A. 25. The court therefore ordered petitioner to serve the minimum amount of that range, 18 months, in prison, to be followed by 12 months of

further supervised release outside prison. J.A. 26, 40-41.[12] Petitioner began to serve his term of prison immediately.

b. Petitioner appealed the revocation of his supervised release, contending that the application of Section 3583(h) to his case violated the Ex Post Facto Clause. The court of appeals affirmed. J.A. 48-49. The court relied (J.A. 49) on circuit precedent which had held that the application of Section 3583(h) to the case of an offender whose underlying crime was committed before Section 3583(h) was enacted was not retroactive at all. That precedent had reasoned that Section 3583(h) "does not alter the punishment for defendant's original offenses; [S]ection 3583(h) instead imposes punishment for defendants' new offenses for violating the conditions of their supervised release—offenses they committed after [S]ection 3583(h) was passed." *United States* v. *Page*, 131 F.3d 1173, 1176 (6th Cir. 1997), cert. denied, 119 S. Ct. 77 (1998).

c. After receiving good-conduct credits, petitioner was released from prison on July 7, 1999, and began serving his 12 months of renewed supervised release. In the absence of further action by the district court, petitioner's term of supervised release will be completed on July 6, 2000.

---

[12] The district court did not expressly refer to Section 3583(h) as authority for requiring petitioner to serve 12 more months on supervised release outside prison. In context, however, it does appear that the court relied on Section 3583(h), rather than Section 3583(e)(3), which had previously been construed by the Sixth Circuit not to authorize sentencing courts, upon revoking supervised release, both to order the offender to serve a term of imprisonment and to require additional supervised release outside. See pp. 7-8, *supra*. Defense counsel lodged an objection based on the Ex Post Facto Clause to the order imposing 12 months of further supervised release, and the district court noted that that Ex Post Facto Clause challenge (presumably, given the context, to Section 3583(h)) had already been rejected by the Sixth Circuit. J.A. 27-28.

SUMMARY OF ARGUMENT

A. The Ex Post Facto Clause did not preclude the district court, upon revoking petitioner's supervised release, from exercising its authority under 18 U.S.C. 3583(h) to order petitioner to serve a new term of supervised release outside prison after his term of reimprisonment. To fall within the proscription of the Ex Post Facto Clause, a new law must disadvantage the offender by making him subject to a punishment that is more onerous than the punishment for the offense under prior law. Section 3583(h) does not contravene that proscription, because even before it was enacted, district courts had the authority under 18 U.S.C. 3593(e)(3) (1988 & Supp. IV 1992) to order offenders to serve a term of reimprisonment followed by a renewed term of supervised release.

Although, by the time petitioner committed his offense, the Sixth Circuit had ruled that district courts revoking supervised release did not have the authority under Section 3583(e)(3) to impose both reimprisonment and renewed supervised release, this Court is not bound by that determination. Petitioner's claim under the Ex Post Facto Clause requires the Court to compare federal law at two different times. That comparison should be made between two correct determinations of the state of the law. This Court's construction of Section 3583(e)(3) is necessarily the correct one, even if the Sixth Circuit had ruled to the contrary before the offense took place. Nor would it be unfair to apply this Court's accurate construction of Section 3583(e)(3) to petitioner, because even at the time of his offense, the circuits had reached differing conclusions about the district courts' authority, and petitioner thus had fair notice of the possibility that this Court might resolve the conflict and render a ruling unfavorable to him.

The text, purpose, and background of Section 3583(e)(3) as in effect at the time of petitioner's offense show that district

courts had the authority, when revoking supervised release, to order both reimprisonment and renewed supervised release. Congress's use of the term "revoke" in this context, which is to be contrasted with its use elsewhere of the term "terminate" (there meaning "extinguish"), indicates that Congress did not believe that a "revoked" term of supervised release was entirely annulled. Rather, Congress authorized the district courts to call back the term of supervised release and reimpose it as if *ab initio*. Congress also directed the district courts to order the offender to "serve in prison all or part of the term" of supervised release after it was revoked. That locution indicates that Congress understood that, even after an offender's supervised release term was "revoked," a term of supervised release existed, even though "all or part" of that term had to be "serve[d] in prison." That construction also makes sense of Congress's direction that offenders whose supervised release was revoked should lose credit for all time spent on supervised release before its revocation.

Our construction also accords with the dominant purpose of supervised release, to afford offenders assistance in reintegration into society and rehabilitation. The authority to revoke supervised release and impose new sanctions is among a range of powers granted to the district courts to oversee an offender's progress on supervised release. A district court may, for example, intensify the conditions of supervised release if it believes the offender is having trouble readjusting to society, or it may terminate supervised release early if it believes the offender has made a successful transition. So too here, a district court may determine that an offender needs a brief period of reincarceration, followed by a new opportunity for successful reintegration with the assistance of probation officers. It would ill serve Congress's policies to deny the district courts discretion to impose supervised release on those offenders who need it the most.

The background of supervised release, in probation, parole, and special parole before enactment of the Sentencing Reform Act of 1984, confirms our construction. Under all three forms of nondetentive monitoring, a court, after revoking the supervision and directing reincarceration, could order a new period of similar nondetentive monitoring. Nothing in the supervised release statute indicates that Congress intended to depart from that practice.

B. If the Court concludes that Section 3583(e)(3) did not authorize the district court to order petitioner to serve a renewed term of supervised release outside prison after revoking his supervised release, then the case should be remanded to the district court. This Court's ex post facto decisions have generally looked to the standard of punishment imposed by penalty provisions, rather than the actual penalty imposed on an offender, to determine whether the new law is more onerous than old law and thus inapplicable to pre-enactment offenses. The Court's previous cases, however, involved situations where the legislature increased the minimum penalty authorized for an offense, not a case like this one, where the minimum penalty remained the same but the maximum penalty authorized was elevated. The ex post facto considerations in the latter situation may be different where the offender is sentenced within the range authorized under prior law.

Nonetheless, this case does not present a circumstance for the Court to determine whether any different ex post facto analysis should be applied in such a case. It cannot be stated with confidence that petitioner received a sanction within the range authorized under petitioner's version of prior law. Although the total amounts of supervised release and reimprisonment that petitioner has actually served are less than the maximum amounts he might have expected to serve when he committed his offense, he has served them in a sequence not authorized under prior law. And when the

district court revoked petitioner's supervised release, it imposed a total restraint on petitioner's liberty (combined reimprisonment and supervised release) longer than the total duration of reimprisonment authorized under prior law. Accordingly, if the Court accepts petitioner's construction of Section 3583(e)(3), the proper remedy is for the Court to order the case remanded to the district court.

ARGUMENT

THE DISTRICT COURT'S ORDER UNDER 18 U.S.C. 3583(h) REQUIRING PETITIONER TO SERVE A RENEWED PERIOD OF SUPERVISED RELEASE OUTSIDE PRISON AFTER HIS PERIOD OF REINCARCERATION DOES NOT VIOLATE THE EX POST FACTO CLAUSE

A. Even Before Section 3583(h) Was Enacted, District Courts Had The Authority, When Revoking Supervised Release, To Order An Offender To Serve A Renewed Period Of Supervised Release Outside Prison After A Period Of Reincarceration

"To fall within the *ex post facto* prohibition, a law must be retrospective—that is, it must apply to events occurring before its enactment—and it must disadvantage the offender affected by it, by altering the definition of criminal conduct or increasing the punishment for the crime." *Lynce* v. *Mathis*, 519 U.S. 433, 441 (1997) (internal quotation marks and citation omitted). This case concerns only the second of those conditions; we do not contend here that Section 3583(h) is not "retrospective" in the sense of not applying to petitioner's original criminal conduct.[13] We do submit, however,

[13] We therefore do not agree with the reasoning of the Sixth Circuit that Section 3583(h) satisfies Ex Post Facto Clause scrutiny in this case simply because it was passed before petitioner violated the conditions of his supervised release. See J.A. 49; *Page*, 131 F.3d at 1175. In our view, the Sixth Circuit's statement in *Page* (*ibid.*) that Section 3583(h) "imposed a new sentence for the later misconduct of violating the terms of the

that Section 3583(h) does not disadvantage petitioner, because even before that provision was enacted, the district courts already had the authority, when revoking an offender's supervised release, to order the offender to serve a term of incarceration followed by a renewed period of supervised release, if the combined period was no greater than the original period of supervised release imposed on the offender. Thus, even under prior law, the district court could have ordered petitioner to serve a combined period of reincarceration (subject to a maximum of two years) followed by further supervised release, totaling three years (the period of supervised release initially imposed on petitioner, and the statutory maximum period as well).

1. In Determining The State Of The Law Before Section 3583(h) Was Enacted, This Court Should Make An Independent Construction Of Section 3583(e), Rather Than Accept The Sixth's Circuit's Prior Construction As Controlling

A challenge to a statute under the Ex Post Facto Clause requires the Court to compare the state of the law before passage of the challenged statute and that afterwards, to determine whether the new provision has altered the law in a way to make it the criminal penalty applicable to the defendant's offense more onerous. See *Weaver* v. *Graham*, 450 U.S. 24, 30-31 (1981) (a new law violates the Clause "if it is both retrospective and more onerous than the law in effect on the date of the offense"). This Court should make an

---

supervised release, and therefore it did not extend the original sentence for the original offense," is inaccurate. Whether or not the application of Section 3583(h) in a case like this one to require a new period of supervised release outside prison might be described as imposing a "new sentence" for a post-enactment violation of supervised release (which need not be a criminal offense), it also constitutes part of the penalty for the original offense. Indeed, imprisonment for a violation of supervised release (which is established before the district court by a preponderance of the evidence, see 18 U.S.C. 3583(e)(3)), is justified only on that basis.

independent determination whether, even before enactment of Section 3583(h), Section 3583(e) itself authorized the district courts to order an offender to serve both a period of reimprisonment and a subsequent period of renewed supervised release; it should not simply accept the Sixth Circuit's position—which had already been announced at the time petitioner committed his offense—that district courts in that circuit did not have such authority under Section 3583(e). See pp. 7-8, *supra* (discussing Sixth Circuit's decision in *United States* v. *Truss*, 4 F.3d 437 (1993)).

Before Congress enacted Section 3583(h), this Court had not decided whether other provisions of the supervised release statute, including Section 3583(e), authorized the district courts to order both a period of imprisonment and a new period of supervised release outside prison when revoking supervised release. Moreover, the lower courts had already registered disagreement on that question by the time petitioner committed his offense. See pp. 7-8, *supra*. At the time of the offense, therefore, there was no definitive judicial construction of Section 3583(e) answering that question. Only this Court can finally resolve whether Section 3583(e) provided the district courts with such authority: "It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law." *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312 (1994).

If this Court *now* concludes that Section 3583(e) provided the district courts with authority to order both reimprisonment and renewed supervised release, it will be irrelevant that the Sixth Circuit might have previously concluded to the contrary. Once this Court renders a definitive construction of Section 3583(e), that construction "is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers*, 511 U.S. at 312-313. "[W]hen this Court construes a

statute, it is explaining its understanding of what the statute has meant continuously since the date it became law." *Id.* at 313 n.12; see also *Bousley* v. *United States*, 523 U.S. 614, 625 (1998) (Stevens, J., concurring in part and dissenting in part).

A contrary approach, requiring this Court to accept the Sixth Circuit's construction of Section 3583(e), would have undesirable consequences. First, it would prevent the uniform application of Section 3583(h) across the country. Because the First and Eighth Circuits had previously accepted the government's construction of Section 3583(e), there can be no Ex Post Facto Clause objection to the application of Section 3583(h) in those circuits to an offender similarly situated to petitioner, convicted of the same offense and initially sentenced to the same terms of prison and supervised release.[14] But either Section 3583(h) is an ex post facto law as applied to one in petitioner's situation or it is not; the constitutionality of the law cannot depend on the offender's location.[15] And either the law before Section 3583(h) was enacted permitted both a period of imprisonment and a new period of supervised release outside prison or it did not. The answer depends on this Court's construction of Section 3583(e) as in effect at the time of petitioner's offense.

Second, if (as we submit) the law before Section 3583(h) was enacted did authorize the district courts to order both

[14] See *United States* v. *St. John*, 92 F.3d 761, 765-767 (8th Cir. 1996) (holding that Section 3583(h) is not an ex post facto law because it did not change the law in that circuit).

[15] Moreover, it would be unclear what rule should be applied in the case of an offender who, during his initial period of supervised release, moved (with the district court's permission) from a circuit that had previously rejected the government's construction of Section 3583(e) to one that had accepted it (or vice versa), and then violated a condition of his supervised release. One such case is pending before the Court. See U.S. Br. at 5-6, *Marlow* v. *United States*, No. 99-6879 (noting that defendant moved from Sixth Circuit to Eighth Circuit while on supervised release).

reimprisonment and renewed supervised release, then a rule requiring this Court to accept the lower courts' prior contrary interpretations of Section 3583(e) would result in a windfall to defendants in those circuits that had construed Section 3583(e) incorrectly.[16] Since the Ex Post Facto Clause requires a comparison between the states of the law at two different times, defendants should not be allowed to rely on a decision about the state of prior law that is, in fact, incorrect. Rather, the Court should make a comparison between two accurate and definitive determinations about the state of the law before and after enactment of Section 3583(h).[17]

[16] Cf. *Lockhart* v. *Fretwell*, 506 U.S. 364, 370 (1993) (Sixth Amendment should not be construed to grant the defendant "a windfall to which the law does not entitle him"; ineffective assistance of counsel claim could not be based on counsel's failure to make objection that would have been supported by lower court decision that was subsequently overruled); *id.* at 373 (O'Connor, J., concurring) (ineffective assistance of counsel claim should not be "based on considerations that, as a matter of law, ought not inform the inquiry").

[17] The Court followed a somewhat analogous approach in *Cisneros* v. *Alpine Ridge Group*, 508 U.S. 10 (1993). In that case, the Ninth Circuit initially construed a standard contract between the federal government and private landlords covering rent increases for government-subsidized housing for low-income tenants in a manner adverse to the government, prohibiting the government from using independent market comparability studies to limit payments to landlords to prevailing market rents for comparable housing. This Court denied the government's petition for a writ of certiorari. Congress then enacted a statute expressly permitting the government to limit rent adjustments to prevailing market rents as determined by comparability studies. The Ninth Circuit invalidated the statute under the Due Process Clause, concluding that it impermissibly impaired the landlords' vested rights to rent increases under that court's previous interpretation of the contract. This Court reversed. In doing so, the Court rejected the premise of the Ninth Circuit's decision, that the contract between the government and the landlords prohibited the use of market comparability studies to limit rent increases. *Id.* at 17-21. Having rejected that premise, the Court had no occasion to determine whether the challenged statute unconstitutionally affected any vested rights. Thus, this Court did not defer to the court of appeals' prior, incorrect

It is true that, by the time petitioner committed his offense, the Sixth Circuit, where that offense took place, had already rejected the government's construction of Section 3583(e). The Court has stated that "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States* v. *Lanier*, 520 U.S. 259, 266 (1997); see *Bouie* v. *City of Columbia*, 378 U.S. 347, 353 (1964) (due process prevents retroactive application of "an unforeseeable judicial enlargement of a criminal statute").[18] But when petitioner committed his offense, one circuit had already accepted the government's construction, one circuit had initially done so but had then changed position, and one circuit had issued conflicting decisions, first rejecting the government's position and then endorsing it as well-reasoned but not adopting it because of circuit precedent. See pp. 7-8, *supra*. The language of the statute itself (as we explain, pp. 24-26, *infra*) also gave petitioner notice of the government's construction. Petitioner therefore cannot complain that he would be unfairly surprised by a decision of this Court definitively construing Section 3583(e) in a manner different than the Sixth Circuit's decision in *Truss*.[19]

---

determination of the contractual obligation between the government and the landlords, even before the curative statute was enacted, but construed the contract independently.

[18] This Court has also held that its cases overruling its *own* past decisions and expanding the permissible basis of criminal liability are not to be applied retroactively. See *Marks* v. *United States*, 430 U.S. 188, 194-195 (1977) (holding that *Miller* v. *California*, 413 U.S. 15 (1973), which overruled *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966), and permitted greater criminal proscription of obscenity, could not be applied retroactively). This case, of course, does not involve such a situation.

[19] See *United States* v. *Rodgers*, 466 U.S. 475, 484 (1984) (after accepting government's construction of 18 U.S.C. 1001, Court rejected argument that applying that construction to the case before it would be unfair, even though the court of appeals had rejected the government's construction

2. Section 3583(e) As In Effect At The Time Of Petitioner's Offense Authorized The District Court To Order Reincarceration Followed By Renewed Supervised Release

Section 3583(e)(3), as in effect at the time of petitioner's offense, authorized a district court, upon finding that an offender violated a condition of supervised release, to "revoke a term of supervised release, and require the person to serve in prison all or part of the term of supervised release without credit for time previously served on postrelease supervision." 18 U.S.C. 3583(e)(3) (1988 & Supp. IV 1992). The authority to revoke supervised release was one of four kinds of powers provided to the district courts overseeing a defendant's supervised release, stated in the disjunctive.

The Sixth Circuit concluded in *Truss* that, when a district court "revoke[d]" an offender's initial term of supervised release under Section 3583(e)(3), it was required to annul the defendant's supervised release entirely and to order the defendant to serve all or part of his term of supervised release in prison, without the possibility of ordering the defendant to submit to a relatively short period in prison followed by a renewed period of supervised release. See 4 F.3d at 439. The Sixth Circuit reached that conclusion even though it recognized that "an additional term of supervised release may be in the best interests of an orderly administration of justice," *ibid.*; see also *id.* at 442 (acknowledging its construction produced an "anomalous result"), and even though a panel of the Eleventh Circuit had found that construction of Section 3583(e)(3) to be "contrary to common sense," *Williams*, 2 F.3d at 365. As we now show, the text, purpose, and background of Section 3583(e) contradict the Sixth Cir-

---

before the crime took place, because "the existence of conflicting cases from other Courts of Appeals" at the time of offense "made review of that issue by this Court and decision against the position of the [defendant] reasonably foreseeable").

cuit's construction in *Truss*. See generally *United States* v. *O'Neil*, 11 F.3d 292 (1st Cir. 1993) (offering persuasive construction of Section 3583(e).

a. *The text of Section 3583(e)*

The Sixth Circuit's construction of Section 3583(e) in *Truss* was based largely on its view that, when a court "revokes" a defendant's supervised release, the term of supervised release must be entirely terminated, and the court's power to order supervised release for that particular defendant is extinguished. See 4 F.3d at 439-441. Although "revoke" in some contexts does mean "terminate" or "extinguish," the word can assume a different meaning in other contexts. Cf. *Deal* v. *United States*, 508 U.S. 129, 132 (1993) ("the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used"). The statutory context of Section 3583(e)(3) favors the interpretation that "revoke" as used there means "to call back" or "to undo." See *Black's Law Dictionary* 1322 (6th ed. 1990) (defining "revoke" as "[t]o annul or make void by recalling or taking back"); *O'Neil*, 11 F.3d at 295-296. And "[i]f a term has been called back, it may be reimposed." *Ibid.* Section 3583(e)(3) therefore authorizes the court to undo the course of supervised release thus far followed and to reformulate it, as if *ab initio*, including a condition that the person serve "all or part of the term of supervised release" in prison and the rest outside of prison under continued supervision.

The first indication that Congress intended "revoke" to mean something other than "terminate" is that Congress separately used the word "terminate" in Section 3583(e)(1), where it granted the court authority to "terminate a term of supervised release and discharge the person released at any time after the expiration of one year of supervised release." Had Congress intended that the effect of revocation under Section 3583(e)(3) would be to extinguish completely the initial term of supervised release and substitute imprisonment, then it more likely would have used the term, "terminate," or a close synonym, instead of "revoke."[20]

A second indication of Congress's meaning is found in its description of the consequence of a revocation under Section 3583(e)(3): the court may "require the person to serve in prison all or part of *the term* of supervised release." 18 U.S.C. 3583(e)(3) (1988 & Supp. IV 1992) (emphasis added). The reference to "the term" of supervised release would be meaningless if the act of revocation had entirely eliminated the district court's authority to place the offender on supervised release; in that event, "the term" of supervised release could no longer exist. See *O'Neil*, 11 F.3d at 295 (observing that "the supervision term recommenced upon revocation—else there would be no term then in existence" before the offender to serve in prison). The implication of Congress's use of the phrase "the term" of supervised release is that such a term continues to exist even after the district court has "revoke[d]" the initial term of supervised release.[21]

---

[20] Congress also used the word "terminate" in the original version of Section 3583(g), which was in effect when petitioner committed his underlying offense. That version of Section 3583(g) provided that, if the person on supervised release is found to possess a controlled substance, "the court shall terminate the term of supervised release and require the defendant to serve in prison not less than one-third of the term of supervised release." 18 U.S.C. 3583(g) (1988 & Supp. IV 1992). Subsequently, however, Congress apprehended that the term "terminate" was inappropriate in that context, for it amended Section 3583(g) to change the terminology from "terminate" to "revoke." See Pub. L. No. 103-322, Tit. IX, § 110505, 108 Stat. 2017.

[21] As noted above (p. 9 n.8, *supra*), in 1994 Congress amended Section 3583(e)(3) to provide that the district court, on revoking supervised release, may require an offender to serve in prison all or part of the term of supervised release "authorized by statute for the offense" for which he was convicted, not just all or part of "the term" of supervised release to which the offender had originally been sentenced. See Pub. L. No. 103-322, Tit. XI, § 110505, 108 Stat. 2016.

Third, Congress provided that a district court may order a defendant whose supervised release is revoked to "serve in prison" all or part of the term of supervised release. 18 U.S.C. 3583(e)(3) (1988 & Supp. IV 1992). If Congress had intended the revocation proceeding to end supervised release completely, Congress would more likely have provided that the district court should "order the person imprisoned." The implication of Section 3583(e)(3) as in effect in 1993, therefore, is that the defendant was to be ordered to serve his term of supervised release, which term was still in existence, in prison, not that the supervised release term was to be extinguished.

Fourth, Congress specified that a defendant whose supervised release was revoked would lose "credit for time previously served on postrelease supervision." 18 U.S.C. 3583(e)(3) (1988 & Supp. IV 1992). If the intended effect of revocation was to extinguish the original supervised-release term and substitute a term of imprisonment, then there would be no reason to specify that the person lost credit. The extinguishment of the original term of supervised release would eliminate the question of credit. But if the district court has the authority to call back and reformulate the term of supervised release, then it is important to specify whether the defendant should receive credit for the time already spent on supervised release.

All of these features of Section 3583(e)(3) readily make sense if the meaning of "revoke" is that the court calls back the original term of supervised release and requires the person to redo it, starting with a condition that he serve part of his supervised-release term in prison. Those features do not make sense if "revoke" in this context must be read to mean "extinguish."

b. *The purpose of supervised release*

Our construction of Section 3583(e)(3) is consistent with the dominant purpose of supervised release, which is to provide assistance to an offender released from prison in his reintegration into society and rehabilitation. See pp. 3-4, *supra*. In this respect Section 3583(e)(3) should be considered together with the other powers granted to the district court in Section 3583(e), all of which are designed to ensure a successful transition for the defendant from prison to society outside prison. Those other powers show that the district court was granted a continuing supervisory authority, during the entire period of supervised release, to monitor the progress of the offender and to adjust the conditions of supervised release to assure his successful reentry into the community. Under Section 3583(e)(2), for example, the court, "at any time prior to the expiration or termination of the term of supervised release," may "extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release." 18 U.S.C. 3583(e)(2) (1988 & Supp. IV 1992). There is no triggering requirement that the court find a violation of the conditions of supervised release. Rather, the court may, in its discretion, extend the term or enlarge the conditions "at any time."[22] Likewise, under Section 3583(e)(1), the court may "terminate a term of supervised release and discharge the person released at any time after the expiration of one year of supervised release" if the court "is satisfied that such action is warranted by the

[22] Section 3583(e)(2) requires that any extension of a term of supervised release be made "pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation." Federal Rule of Criminal Procedure 32.1(b) does not require a violation of probation as a predicate to the modification (including extension) of probation, although Rule 32.1(a) does require a violation as a predicate to the revocation of probation. The district court's action to modify the conditions of supervised release is subject to review on appeal for abuse of discretion. See, *e.g.*, *United States* v. *Edgin*, 92 F.3d 1044, 1047 (10th Cir. 1996), cert. denied, 519 U.S. 1069 (1997); *United States* v. *Schechter*, 13 F.3d 1117, 1118-1119 (7th Cir. 1994).

conduct of the person released and the interest of justice." 18 U.S.C. 3583(e)(1) (1988 & Supp. IV 1992).

Section 3583(e) thus gives the court broad and flexible authority to monitor the offender's progress on supervised release and to adjust the conditions of the release as appropriate in light of the offender's situation. It is fully consistent with the tenor of those provisions to conclude that, when an offender has shown his unwillingness to comply with the conditions of supervised release, he may be required to start the term over again under Section 3583(e)(3) and to serve a part of that term in prison and the rest outside prison under continued supervision. But it would be inconsistent with the statutory theme of continued supervision to construe Section 3583(e)(3) to require that the person be discharged without supervision after serving time in prison, when that person has demonstrated by his violation that he is most in need of continued supervision in order to achieve successful return to productive society.

Under petitioner's (and the Sixth Circuit's) contrary construction of Section 3583(e)(3), if an offender on supervised release violated his conditions, and the district court concluded that both a limited period of reincarceration and intensification of the degree of supervision of the offender were necessary to promote his reintegration into society, the district court would nonetheless be precluded from achieving both of those objectives. The court would have to choose between the two. That construction leads to the peculiar result of requiring the district court to choose between exercising the greater power of ordering reincarceration or the lesser power of intensifying the conditions of supervised release, even for the same period of time, while denying the court the authority to combine those two powers. Thus, in the case of a Class A felony offender who was originally sentenced to five years' supervised release and who violated the conditions of supervised release, the district court could

require that offender to serve the remainder of the five-year term in jail, *or* it could substantially increase the offender's reporting requirements and limit his movements for the remainder of those five years, but it could not do both: it could not, for example, order the defendant to serve half of the remainder of the five-year term in jail and serve the second half outside prison, but subject to close supervision by a probation officer. There is no evident reason why Congress would have wanted to deny the district courts that option.

Petitioner's construction leads to particularly anomalous results in those cases where the defendant was initially sentenced to a term of supervised release that was less than the statutory maximum. Assume, for example, that an offender was a Class B felon and was therefore subject to a statutory maximum term of supervised release of five years. See 18 U.S.C. 3583(b). Assume further that the district court, when initially sentencing that defendant, concluded that three years of supervised release would be sufficient for his reintegration into society. If the offender violated his supervised release, but if that violation was not extremely serious, the district court might conclude that a limited period of reincarceration was necessary but that the offender needed further supervision after the period of reincarceration for his reintegration to be successful, and that he should be required to serve the two additional years of supervised release to which the district court could have initially sentenced him. In petitioner's view and that of the Sixth Circuit, the district court would not have the power to impose such an order. The district court would be required to choose between extending the term of supervised release to five years and foregoing reimprisonment, and ordering

reimprisonment and abandoning the policy of supervised release altogether.[23]

The construction of Section 3583(e)(3) we have advanced grants the district court the full flexibility contemplated by Congress for the court to adjust supervised release to assure the person's successful reentry into the community. If it appears that the person has successfully reintegrated into the community and does not need further supervision, the court may terminate the term of supervised release anytime after one year and discharge the person. 18 U.S.C. 3583(e)(1). If a modification during the term of supervised release is appropriate to assure the person's successful reentry into the community, a change can be made to the conditions of supervised release or its duration (within the statutory limit) as an exercise of the court's sound discretion. 18 U.S.C. 3583(e)(2). When a person has shown maladjustment by his inability or unwillingness to comply with the previous conditions of release, the court has the additional option of revoking the term, and requiring the offender to serve a short period of reimprisonment, followed by a new opportunity for the offender to achieve successful reintegration into the community through a renewed period of supervised release outside prison.

[23] A possible example of such a case is *United States* v. *Cooper*, 962 F.2d 339 (4th Cir. 1992). In that case, the defendant, who was convicted of a relatively minor narcotics offense under 21 U.S.C. 841(a)(1), involving less than one ounce of cocaine, was initially sentenced to five months of incarceration, to be followed by five years' supervised release, including drug treatment. (Because the conviction involved a narcotics offense, the maximum periods of supervised release in Section 3583(b) did not apply. See p. 3 n.2, *supra*.) When on supervised release he violated one of the conditions by seeing his girlfriend, who was a convicted felon. The district court revoked his supervised release and sentenced him to two months of intermittent confinement in a jail facility, to be followed by four and one half years of further supervised release. The court of appeals concluded that the renewed term of supervised release was not authorized by Section 3583(e)(3), because the district court had revoked the initial term of supervised release. 962 F.2d at 341-342. A district court operating under such a regime—forced to choose between ordering the defendant to serve additional time in prison but forfeiting the possibility of continued supervised release thereafter, and keeping the defendant on supervised release but foregoing the use of a short period of reimprisonment—might well order the defendant to serve a relatively lengthy period in prison since a short period in prison, without continued supervised release thereafter, might be insufficient to satisfy the purposes of supervised release in such a situation.

In accordance with our construction of Section 3583(e)(3), the district court had authority before Section 3583(h) was enacted to revoke petitioner's three-year term of supervised release and to require that he start over, serving up to the first 24 months in prison and the remaining 12 months on continued supervised release outside prison. Section 3583(h) did not give the district court any greater authority. Indeed, Section 3583(h) cabined the district court's authority in one respect; it provided that renewed obligation to serve supervised release outside prison may not be imposed unless the district court orders the offender to serve less than the maximum term of reimprisonment authorized by prison. See 18 U.S.C. 3583(h); *United States* v. *Davis*, 187 F.3d 528 (6th Cir. 1999) (remanding for district court to impose less than two-year maximum to be followed by continued supervised release).[24]

[24] Applying the terms of Section 3583(e)(3), a district court would have authority based on continued violations of the conditions of supervised release to revoke a person's supervised release a second time, or any number of subsequent times, and require him to start over each time, limited only by the abuse of discretion standard. That approach is consistent with the purpose of supervised release to ensure the person's successful integration into the community. Since on each occasion of revocation the offender must lose credit for time previously served on postrelease supervision, see 18 U.S.C. 3583(e)(3), the revocation process necessarily contemplates the possibility that a defendant will end up serving more time on supervised release than the maximum statutory term of supervised release that might originally have been imposed for his underlying offense.

c. *Background of supervised release*

Our construction also finds support in the practice of probation, parole, and special parole predating the introduction of supervised release into the federal system. See *O'Neil*, 11 F.3d at 298-300. A similar question arose under the old probation statute, which empowered the court to "revoke the probation * * * and * * * impose any sentence which might originally have been imposed." 18 U.S.C. 3653 (1982). The majority of courts concluded that a new term of probation was a "sentence" that might be imposed after the court's revocation of the initial term of probation. See *O'Neil*, 11 F.3d at 298-299 (collecting cases).

As to parole, "[t]here was never any question that nondetentive monitoring could follow a prison sentence imposed in consequence of the revocation of a term of parole or special parole." *O'Neil*, 11 F.3d at 299; see also *United States Parole Comm'n* v. *Williams*, 54 F.3d 820, 824 (D.C. Cir. 1995) (noting "the established pre-Guidelines sentencing principle that parole is available unless expressly precluded") (internal quotation marks omitted); 28 C.F.R. 2.52 App. (Parole Commission Policy Statement, referring to "an adequate period of renewed supervision following release from reimprisonment"). Congress, moreover, was aware of

---

That does not mean, however, that an offender faces the prospect of endless returns to prison should he violate the conditions of his supervised release each time he is placed on supervised release. In our view, the maximum terms of reimprisonment authorized by Section 3583(e)(3) apply to the totality of the offender's history on supervised release after conviction for a particular offense, and not to each occasion on which he is placed on supervised release based on that conviction (including each time his supervised release might be revoked). Thus, an offender like petitioner who was convicted of a Class D felony faces only a maximum of two years' reimprisonment for all of his possible violations of supervised release based on that particular offense. At some point the district court's authority over an offender comes to an end. Cf. *United States Parole Comm'n* v. *Williams*, 54 F.3d 820, 823 (D.C. Cir. 1995) (reaching similar conclusion about old special parole statute, 21 U.S.C. 841(c) (1982)).

this practice, for the legislative history to the Sentencing Reform Act specifically noted that under pre-Guidelines law, "if a parolee violates a condition of parole that results in a determination to revoke parole, the revocation has the effect of requiring the parolee to serve the remainder of his original term of imprisonment, *subject to periodic consideration for re-release* as required for any prisoner who is eligible for parole." *O'Neil*, 11 F.3d at 299 (quoting S. Rep. No. 225, *supra*, at 123) (emphasis added in *O'Neil* opinion). Congress therefore understood that the concept of "revoking" nondetentive monitoring like parole was fully consistent with the possibility that the offender would again be eligible for and subject to such monitoring even if the offender was also required to return to prison.

The practice under special parole, which before enactment of the Sentencing Reform Act was a part of the sentence required for certain narcotics offenses under Title 21, further supports our construction. Special parole is similar to supervised release in that it is a part of the criminal sentence required to be served after the defendant's completion of his prison term (or any other form of nondetentive supervision, such as probation), rather than in lieu of the prison term. See 28 C.F.R. 2.57(a). Under the old special parole statute, which was worded similarly to Section 3583(e)(3), when an offender's special parole term was revoked, his original term of imprisonment was increased by the period of the special parole term (without credit for the time spent on special parole outside prison), and "[a] person whose special parole term has been revoked [might] be required to serve all of part of the remainder of the new term of imprisonment." 21 U.S.C. 841(c) (1982). But although the special parole statute did not expressly provide for the reimposition of special parole after revocation of the initial term of special parole and reimprisonment, the Parole Commission required such reparole: "Should a parolee violate conditions of release

during the Special Parole Term he will be subject to revocation on the Special Parole Term * * * and subject to reparole or mandatory release under the Special Parole Term." 28 C.F.R. 2.57(c).[25] Moreover, like an offender whose supervised release is revoked and who loses credit for time spent outside prison, "a special parole term violator whose parole is revoked shall receive no credit for time spent on parole pursuant to 21 U.S.C. 841(c)." 28 C.F.R. 2.57(c).

Although the Sentencing Reform Act undoubtedly broke new ground in sentencing practices, including the introduction of supervised release, Congress did not completely discard past practice under probation, parole, and special parole (especially the last, of which supervised release was an

[25] A conflict in the circuits has recently developed as to whether the Parole Commission, upon revoking an offender's special parole, may lawfully impose another special parole term after a period of reincarceration. Compare *Billis* v. *United States*, 83 F.3d 209, 211 (8th Cir.) (Parole Commission does have such authority), cert. denied, 519 U.S. 900 (1996), and *United States Parole Comm'n* v. *Williams*, 54 F.3d at 823-824 (same), with *United States* v. *Robinson*, 106 F.3d 610, 611-613 (4th Cir. 1997) (Parole Commission does not have such authority; relying on court's earlier decision holding that court revoking supervised release could not impose new term of supervised release under Section 3583(e)(3)), *Artuso* v. *Hall*, 74 F.3d 68, 71-72 (5th Cir. 1996) (same), *Robles* v. *United States*, 146 F.3d 1098 (9th Cir. 1998) (Parole Commission may not impose second term of special parole; when it releases offender from reincarceration, it releases him on regular parole), *Fowler* v. *United States Parole Comm'n*, 94 F.3d 835, 840-841 (3d Cir. 1996) (same), and *Evans* v. *United States Parole Comm'n*, 78 F.3d 262, 264-265 (7th Cir. 1996) (same). None of those cases had been decided, however, when Congress enacted the supervised release provisions in the Sentencing Reform Act of 1984. At that time, the Parole Commission's thereto unchallenged regulations clearly stated, as they do now, that an offender whose special parole term is revoked and who is ordered to serve a period of reimprisonment may also be ordered to serve a new term of special parole. See 28 C.F.R. 2.57(c) (1984). That was the legal background against which Congress enacted Section 3583(e)(3). Cf. *Brown* v. *GSA*, 425 U.S. 820, 828 (1976) (relevant inquiry for congressional intent is what Congress's understanding of the law was at the time of legislative enactment, not whether that understanding is eventually proven correct).

expansion). That past practice made abundantly clear that an offender whose nondetentive supervision was revoked could be required to serve another such period of supervision after serving a period of reincarceration. Neither the text nor the legislative history of the Sentencing Reform Act gives any indication that Congress intended to depart from that settled practice. "A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change." *Tome* v. *United States*, 513 U.S. 150, 163 (1995). That showing has not been made here.

B. If The Court Concludes That Section 3583(e)(3) Did Not Authorize A Renewed Term Of Supervised Release, Then The Entire Sanction Imposed On Petitioner For Violating Supervised Release Should Be Vacated And The Case Remanded For Further Proceedings

If the Court were to reject our submission that, at the time of petitioner's offense, Section 3583(e)(3) authorized the district court to order petitioner to serve a renewed term of supervised release after revoking his supervised release, the question would then arise whether the application of Section 3583(h) in this case violates the Ex Post Facto Clause because it "disadvantage[d] the offender affected by it by * * * increasing the punishment for the crime." *Lynce*, 519 U.S. at 441 (citation omitted). On the assumption that our construction of Section 3583(e)(3) is wrong, we agree that the sanction imposed on petitioner for violation of his supervised release in this case must be vacated and the case remanded, because the district court relied on Section 3583(h) to impose a sanction on petitioner that is not within the standard of punishment to which he could have been exposed under prior law.

1. The Application Of A New Statute That Raises The Maximum Possible Penalty But Does Not Raise The Minimum Possible Penalty Or Narrow the District Court's Discretion To Impose That Minimum Penalty May Not Violate The Ex Post Facto Clause Where The Offender Is Sentenced Within The Range Authorized Under Prior Law

The framework for identifying whether petitioner was disadvantaged by application of Section 3583(h) must begin with a precise description of the range of options available to the sentencing judge under old law, as compared to the new. Petitioner was convicted of a Class D felony. Under petitioner's construction of prior law, the district court, upon revoking supervised release for a Class D felon, could order the offender to serve a term of reimprisonment of up to two years. 18 U.S.C. 3583(e)(3) (1988 & Supp. IV 1992). Under current law, the district court, upon revoking supervised release, may order a Class D felon to serve up to three years of a combination of imprisonment and supervised release, provided that the term of imprisonment is less than two years. See 18 U.S.C. 3583(a), (e)(3), and (h). Thus, the district court retains the authority to order petitioner to serve the minimum sanction available under prior law, namely one day of reimprisonment alone.[26] But under current law, it would also have been possible for the district court to order petitioner to serve two years less one day of imprisonment, followed by one year and one day of supervised release.

[26] The district court's authority under Section 3583(h) to order an offender to serve a renewed term of supervised release as well is discretionary. See 18 U.S.C. 3583(h) ("the court *may* include a requirement that the defendant be placed on a term of supervised release after imprisonment") (emphasis added). Section 3583(h) therefore did not raise the minimum sanction for violation of supervised release.

That penalty is greater than the maximum available under prior law, two years' imprisonment.[27]

If the sole issue is whether the standard of punishment increased, Section 3583(h) would be considered an ex post facto law in all applications to pre-enactment offenders. While language in this Court's decisions suggests such an analysis,[28] the Court's holdings do not squarely address the precise situation presented where a new law raises the maximum sanction authorized by prior law, but does not raise the minimum sanction or narrow the sentencing court's discretion to impose it, and a particular offender is sentenced

[27] As to some classes of offenders, however, Section 3583(h) is almost certainly no more onerous than prior law in all its applications. For example, under petitioner's construction of prior law, a Class A felony offender who violated his supervised release could be ordered to serve a maximum of five years in prison, but no time on renewed supervised release. See 18 U.S.C. 3583(e)(3) (1988 & Supp. IV 1992). Under current law, however, certain Class A felony offenders whose supervised release is revoked can be ordered to serve a combination of prison and supervised release, up to a total of five years. See 18 U.S.C. 3583(b) (five years' maximum supervised release for Class A felons) and (h) (period of additional supervised release must be no more than the term of supervised release authorized for offense by statute, less any term of reimprisonment actually imposed); but cf. p. 3 n.2, *supra* (discussing life supervised release available for certain drug offenders). Section 3583(h) therefore did not increase the maximum permissible period of restraint to be imposed on those Class A felony offenders. Moreover, the actual conditions of the restraint are likely to be less onerous, because supervised release is a less intrusive restraint on an offender's liberty than incarceration. See *United States* v. *Brady*, 88 F.3d 225, 228-229 (3d Cir. 1996), cert. denied, 519 U.S. 1094 (1997). Nor would the mere potential for reimprisonment for a violation of supervised release make Section 3583(h) an ex post facto law as applied to such a case. See p. 44 n.34, *infra*.

[28] See *Lindsey* v. *Washington*, 301 U.S. 397, 401 (1937) ("the ex post facto clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed"); *Weaver*, 450 U.S. at 33 (ex post facto inquiry "looks to the challenged provision, and not to any special circumstances that may mitigate its effect on the particular individual").

within the maximum sanction permitted under prior law.[29] None of this Court's ex post facto sentencing cases has involved that situation. See *Lynce*, *supra*; *Miller* v. *Florida*, 482 U.S. 423 (1987); *Weaver*, *supra*; *Lindsey* v. *Washington*, 301 U.S. 397 (1937).

In *Lindsey*, the Court concluded that the Ex Post Facto Clause precluded application of a new sentencing statute for grand larceny that fixed a mandatory 15-year prison sentence, with the possibility of parole during that term. At the time of the petitioner's offense, the applicable statute had imposed a maximum sentence of 15 years in prison, with a minimum term of six months, for the same offense. 301 U.S. at 398. The Court held that the new law could not be applied because it "ma[d]e mandatory what was before only the maximum sentence," 15 years in prison. *Id.* at 400. The Court rejected the argument that the petitioner suffered no disadvantage from the new law because he might have received a 15-year sentence under the old law; the new law was more onerous, the Court held, because it removed "the possibility of a sentence of less than fifteen years. * * * It is plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the 15-year term." *Id.* at 401-402.

In *Miller*, the Court invalidated, under the Ex Post Facto Clause, the application of a change in Florida's statutory

[29] Nor has the Court ever decided a case involving a new sentencing law that both lowers the minimum sentence and raises the maximum sentence from that under prior law—for example, where a statute authorizing a prison term of 5-10 years for an offense is replaced by one authorizing a prison term of 2-12 years. Cf. *Weaver*, 450 U.S. at 34 (considering, but rejecting, argument that the "net effect of all [new] provisions increased [rather than decreased] availability of gain-time deductions"); *Miller* v. *Florida*, 482 U.S. 423, 432 (1987) (noting that the State was not "able to identify any feature of the revised guidelines law that could be considered ameliorative").

sentencing guidelines that raised the presumptive sentence applicable to the petitioner. At the time of his offense, the petitioner's presumptive sentence was 3 1/2 to 4 1/2 years, but at the time of sentencing, the guidelines directed a presumptive sentence of 5 1/2 to 7 years, and the court actually imposed a sentence of seven years. See 482 U.S. at 424-425. There was a theoretical possibility that the petitioner might have received a seven-year sentence under the earlier law. But the Court observed that, to depart from the presumptive sentence under the guidelines, the sentencing judge was required to provide clear and convincing reasons in writing for the departure, on facts proved beyond a reasonable doubt, and the defendant would have had the right to appeal. See *id.* at 432-433. Because the petitioner had enjoyed none of those rights, the Court concluded that he "therefore was 'substantially disadvantaged' by the retrospective application of the revised guidelines to his crime." *Id.* at 433.

In *Weaver*, the State repealed a statute that had made available gain-time credits of five, ten, and fifteen days per month, depending on the length of the prisoner's incarceration, and replaced it with a new statute that made available credits of only three, six, and nine days per month respectively. See 450 U.S. at 26. The new statute was indisputably more onerous than prior law; as the Court explained, "[o]n its face, the statute reduces the number of monthly gain-time credits available to an inmate who abides by prison rules and adequately performs his assigned tasks. By definition, this reduction in gain-time accumulation lengthens the period that someone in [the inmate's] position must spend in prison." *Id.* at 33. Similarly, in *Lynce*, the statute under review retroactively canceled prison-overcrowding early-release credits that had been available under the law at the time the offender (and any other inmate convicted of murder or attempted murder) committed his offense. See 519 U.S. at 436. Every offender who fell within the class covered by

the law lost the opportunity to accumulate good-time credits that had been available under prior law, and indeed many lost credits that had already been accumulated.

All of those cases involved a situation where the new law eliminated or significantly reduced the possibility, available under prior law, that the offender might have received a more lenient sentence than was actually imposed. None of those cases addressed the situation presented here, where the new law does not raise the minimum authorized sentence, or alter a judge's discretion to impose it, but does raise the maximum authorized sentence. In *Lindsey*, the Court did allude to that situation, stating that "[t]he Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer," and that "[i]t is for this reason that an increase in the possible penalty is *ex post facto*, regardless of the length of the sentence actually imposed, since the measure of punishment prescribed by the later statute is more severe than that of the earlier." 301 U.S. at 401 (citations and internal quotation marks omitted).[30] But

[30] *Lindsey* cited *State* v. *Callahan*, 109 La. 946 (1903), in which a new statute raised the maximum penalty but not the minimum penalty above that authorized under prior law. In *Callahan*, the defendant was convicted for selling liquor without a license. The old law, in effect at the time of the offense, established a penalty of a fine of $100-$500, and in default of payment the convicted defendant was to be imprisoned to not less than 30 days nor more than four months. The new law provided alternative penalties: under one alternative, the fine remained the same ($100-$500), but in default of payment, the defendant was to be imprisoned "for a term within the discretion of the court"; under the second alternative, the defendant was to "suffer fine and imprisonment as the court may deem proper." *Id.* at 947. The defendant in that case was ordered under the new law to pay a fine of $350, but was not ordered to serve any term of imprisonment. The State argued that the new law was not ex post facto because the penalty imposed on the defendant was within the limit of both the old and the new laws. The Louisiana Supreme Court disagreed, stating that, "[e]ven though a penalty is only possible, and not necessary, the law is ex post facto as to past offenses." *Id.* at 948.

Lindsey's observation as to increases in the maximum penalty was dictum, and it is not necessarily the case that application of a new law that elevates a statutory maximum term, but does not alter the minimum or restrict the sentencing court's discretion to impose it, imposes the sort of "detriment" that this Court has required to find an ex post facto violation.

The elevation of a minimum sentence is somewhat different from the elevation of the statutory maximum. In the former situation, all defendants are denied at least the possibility of being considered for a sentence below the minimum authorized under the new law.[31] The same is not inexorably true when the statutory maximum is raised. There may be circumstances in which the fact that the legislature has increased the maximum sentence authorized for an offense, by itself, should not render the new statute an ex post facto law in certain applications where the defendant was sentenced within the range authorized by prior law.

When a sentencing judge has all the sentencing options that were available under prior law, but has as well a higher statutory maximum, and the judge imposes a sentence within the prior maximum term, the defendant has not experienced a detriment from the new law in a direct sense, *i.e.*, the imposition of a more onerous sentence than was available under prior law. It is conceivable that the defendant might have experienced an indirect detriment, *i.e.*, the imposition

[31] If the court's sentencing options are restricted by binding sentencing guidelines, however, a defendant may not experience actual prejudice from application of such a law. For example, if Congress elevated the statutory minimum for an offense but the Sentencing Guidelines applicable to a particular defendant's crime were not changed, and the district court made clear on the record that the defendant would not receive a downward departure from the Guidelines range in any event, it is difficult to see how the defendant would be prejudiced based on deprivation of the entirely theoretical possibility that the district court might have departed downward and imposed a sentence authorized under old law but not new law.

of a greater sentence within the preexisting range because the judge was influenced by the higher maximum penalty. But legal boundaries on the judge's discretion or the sentencing record itself may make any such possibility remote or nonexistent. Assume, for example, that, between the time of a defendant's crime and his sentencing, Congress increased the penalty for the defendant's offense from 5-10 years to 5-12 years, but that the Sentencing Guidelines applicable to the defendant's individual circumstances were not changed before the defendant was sentenced, and that the district court made clear that no upward departure would be warranted on the facts of the case before it. If the defendant was sentenced below the statutory maximum authorized under prior law and within the Sentencing Guidelines range, it is not clear that the defendant should receive any relief. There would have been, at most, a theoretical possibility that, if the district court had found reason for an upward departure, then the sentence would have been above that authorized under prior law, and a speculative possibility that the district court might have sentenced him at the high end of the Guidelines range based on Congress's elevation of the maximum penalty. Those forms of harms from the change might be deemed so "speculative and attenuated," *California Dep't of Corrections* v. *Morales*, 514 U.S. 499, 514 (1995), as to defeat any ex post facto claim or render it, at worst, harmless error. See Fed. R. Crim. P. 52(a); *Chapman* v. *California*, 386 U.S. 18 (1967).

2. The Actual Sanction Imposed On Petitioner Following Revocation Of His Supervised Release Cannot Confidently Be Said To Be Less Onerous Than That Available Under Prior Law

This case, however, does not present an occasion for the Court to consider the possibility that the mere increase in a statutory maximum sentence does not violate the Ex Post Facto Clause as applied to a defendant sentenced within the

range authorized under prior law. If our construction of Section 3583(e)(3) is rejected, it is not sufficiently clear that the sanction that the district court imposed on petitioner for violating his supervised release could be said to be within the range of sanctions available under prior law.

There are at least two ways of considering whether Section 3583(h) was applied to petitioner's detriment, compared to prior law. The first is to look at petitioner's expectations at the time he committed his offense. At that time, it is undisputed that the law authorized the court to require petitioner to serve as much as three years' supervised release, followed by two years' reimprisonment if his supervised release were revoked at the end of that period. Petitioner might not have violated the conditions of his supervised release until the end of his term, and even if his violation occurred earlier, his supervised release might not have been revoked until the end of his term.[32] Under either circumstance, petitioner could have been required to serve the maximum possible periods of restraint on his liberty, both in the form of supervised release and reimprisonment, that were authorized by statute.

The *actual* periods of supervised release and reimprisonment that petitioner was required to serve in this case are

---

[32] Petitioner had no statutory or constitutional expectation that his supervised release would be revoked immediately after his violation or at any time before the expiration of his three-year term of supervised release. See *Moody* v. *Daggett*, 429 U.S. 78, 87-89 (1976) (no constitutional right to parole-revocation hearing immediately upon issuance of the violation warrant, even when warrant had been outstanding for more than ten years; right to hearing accrues only when violator is taken into custody on the violation warrant). Indeed, under settled law, supervised release may be revoked and the offender returned to prison after the term of supervised release has expired, provided that the revocation warrant was filed during the period of supervised release. *United States* v. *Morales*, 45 F.3d 693, 700-701 (2d Cir. 1995); *United States* v. *Barton*, 26 F.3d 490, 492 (4th Cir. 1994); *United States* v. *Neville*, 985 F.2d 992, 995 (9th Cir.), cert. denied, 508 U.S. 943 (1993).

significantly less than those authorized by statute under prior law. After his initial release from prison, petitioner spent about seven months on supervised release before he committed his violations. Then (putting aside the time petitioner spent in state prison), after his supervised release was revoked, petitioner actually spent about 14 months in prison,[33] and was also required to serve 12 months' further supervised release. Thus, after his release from his initial term of imprisonment, petitioner has been required to serve a total of about 14 months in prison and about 19 months on supervised release. Each of those periods is less than the maximum he unquestionably might have been ordered to serve under prior law–24 months in prison and 36 months on supervised release.

Nevertheless, we do not believe it can be said with confidence that the measure of punishment in Section 3583(h) did not cause petitioner actual disadvantage. If old law had been applied, the judge very likely would not have deferred revocation of petitioner's supervised release to the end of its term, and then imposed the maximum period of reimprisonment. And under the old law, all of petitioner's potential supervised release would be served before his reimprisonment; under the new law, petitioner served supervised release both before and after reimprisonment. Even setting aside the potential for reimprisonment on the renewed period of supervised release,[34] the sequence of serving

[33] When his supervised release was revoked, petitioner was ordered to serve 18 months of reimprisonment, but he was released early. See p. 13, *supra*.

[34] If the offender were to violate the conditions of his renewed term of supervised release, then current law would authorize the district court to revoke his supervised release again and order him to serve an additional term in prison, provided that the total amount of reimprisonment imposed on the offender for violating his supervised release both times was no more than two years. The possibility that an offender's supervised release might be revoked a second time and that the offender might be sent back to prison again, however, must be considered entirely speculative before such a second revocation occurs. At the time that an offender is placed on supervised release, there is no reason to believe that he will violate the conditions of his supervised release; nor is there reason to believe that, even if such a violation occurs, the district court will necessarily revoke his supervised release and order him to serve a term of reimprisonment rather than act under Section 3583(e)(2) to intensify the conditions of his supervised release. See *United States* v. *Withers*, 128 F.3d 1167, 1170-1172 (7th Cir. 1997), cert. denied, 119 S. Ct. 79 (1998). The Court has made clear that the Ex Post Facto Clause is not violated by "the most speculative and attenuated risk of increasing the measure of punishment attached to the covered crimes." *California Dep't of Corrections* v. *Morales*, 514 U.S. at 514. Should a defendant violate his supervised release a second time, the district court can consider at that time whether the Ex Post Facto Clause would prevent it from imposing additional prison time on the offender.

supervised release, then prison time, then additional supervised release may be viewed as a more onerous feature of petitioner's actual sanction under new law compared to his exposure under old law.

Alternatively, the degree of the sanction imposed on petitioner may be viewed from the vantage point of petitioner's legal exposure at the time his supervised release was revoked. At that time, under petitioner's understanding of prior law, the maximum exposure petitioner had was 24 months' reimprisonment, after which he would have been released without restraint. In fact, the total restraint on petitioner's liberty imposed by the district court upon revoking his supervised release was 30 months, consisting of 18 months' reimprisonment to be followed by 12 months' supervised release. To be sure, petitioner might be said to have received a *benefit* from application of Section 3583(h) to his case, because if the district court had lacked the authority to impose a renewed term of supervised release, it might well have ordered petitioner to serve the maximum term of reimprisonment available under prior law, 24 months, rather than the 18 months' reimprisonment that it actually imposed on petitioner. Despite that point, however, it cannot be said that the 30-month sanction imposed on petitioner was within

the range of sanctions available under petitioner's version of prior law.

3. If Application Of Section 3583(h) To Petitioner Violated The Ex Post Facto Clause, The Proper Remedy Is A Remand For The District Court To Apply Former Section 3583(e) To Petitioner

If Section 3583(h) cannot be applied in this case because of ex post facto concerns, then the case should be remanded to the district court. "The usual remedy for an ex post facto violation in sentencing is a remand for resentencing under the law in place at the time the defendant committed his crime." *United States* v. *Lominac*, 144 F.3d 308, 316 (4th Cir. 1998); see *Weaver*, 450 U.S. at 36 n.22. In this case, the district court should consider application of that law in the first instance, in light of petitioner's particular circumstances.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
JAMES K. ROBINSON
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
PAUL R.Q. WOLFSON
Assistant to the Solicitor General
RICHARD A. FRIEDMAN
Attorney

JANUARY 2000

APPENDIX A

The *pre-amendment* version of 18 U.S.C. 3583 was as follows:

§ 3583. Inclusion of a term of supervised release after imprisonment

(a) In general.—The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute.

(b) Authorized terms of supervised release.—Except as otherwise provided, the authorized terms of supervised release are—

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

(c) Factors to be considered in including a term of supervised release.—The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), and (a)(6).

(d) Conditions of supervised release.—The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision and that the defendant not possess illegal controlled substances. The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

(e) Modification of conditions or revocation.—The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), and (a)(6)—

(1) terminate a term of supervised release and discharge the person released at any time after the expiration of one year of supervised release,

pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the person released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the person to serve in prison all or part of the term of supervised release without credit for time previously served on postrelease supervision, if it finds by a preponderance of the evidence that the person violated a condition of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure that are applicable to probation revocation and to the provisions of applicable policy statements issued by the Sentencing Commission, except that a person whose term is revoked under this paragraph may not be required to serve more than 3 years in prison if the offense for which the person was convicted was a Class B felony, or more than 2 years in prison if the offense was a Class C or D felony; or

(4) order the person to remain at his place of residence during nonworking hours and, if the court so directs,

to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

(f) Written statement of conditions.—The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

(g) Possession of controlled substances.—If the defendant is found by the court to be in the possession of a controlled substance, the court shall terminate the term of supervised release and require the defendant to serve in prison not less than one-third of the term of supervised release.

APPENDIX B

The *post-amendment* version of 18 U.S.C. 3583 is as follows:

§ 3583. Inclusion of a term of supervised release after imprisonment

(a) In general.—The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

(b) Authorized terms of supervised release.—Except as otherwise provided, the authorized terms of supervised release are—

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

(c) Factors to be considered in including a term of supervised release.—The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release,

shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), and (a)(6).

(d) Conditions of supervised release.—The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person described in section 4042(c)(4), that the person report the address where the person will reside and any subsequent change of residence to the probation officer responsible for supervision, and that the person register in any State where the person resides, is employed, carries on a vocation, or is a student (as such terms are defined under section 170101(a)(3) of the Violent Crime Control and Law Enforcement Act of 1994). The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4). The results of a drug test administered in accordance with the preceding subsection shall be subject to

confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States,

and may order that he be delivered to a duly authorized immigration official for such deportation.

(e) Modification of conditions or revocation.—The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), and (a)(6)—

(1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds

by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

(f) Written statement of conditions.—The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

(g) Mandatory revocation for possession of controlled substance or firearm or for refusal to comply with drug testing.—If the defendant—

(1) possesses a controlled substance in violation of the condition set forth in subsection (d);

(2) possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of supervised

release prohibiting the defendant from possessing a firearm; or

(3) refuses to comply with drug testing imposed as a condition of supervised release;

the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

(h) Supervised release following revocation.—When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term of imprisonment authorized under subsection (e)(3), the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

(i) Delayed revocation.—The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

Supreme Court, U.S.
FILED
FEB 14 2000
CLERK

No. 99-5153

In The

Supreme Court of the United States

CORNELL JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONER CORNELL JOHNSON

JEFFREY T. GREEN
JOSEPH S. MILLER
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

LEAH J. PREWITT
RITA C. LALUMIA*
Federal Defender Services
of Eastern Tennessee, Inc.
707 Georgia Avenue
Suite 203
Chattanooga, Tennessee
37402
(423) 756-4349

Of Counsel

Counsel for Petitioner Cornell Johnson

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. The District Court Had No Authority, Prior to Enactment of Section 3583(h) in 1994, to Reimpose a Term of Supervised Release Following Imprisonment for One Whose Supervised Release Was Revoked 1

A. The Text of the Statute Plainly Did Not Authorize Reimposition of Supervised Release 2

B. The Purpose of Section 3583(e)(3) Demonstrates the District Court's Authority to Impose a Term in Prison, but Not to Reimpose Supervised Release, upon Revocation 9

C. The Background of the Supervised Release Statute Demonstrates That Congress Initially Intended to Limit the Scope of the Penalties for Supervised Release Revocation 11

II. If the Court Determines That the Statute Is Ambiguous, the Rule of Lenity Requires a Finding That Subsection (e)(3) Did Not Authorize Reimposition of Supervised Release 16

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Artuso v. *Hall*, 74 F.3d 68 (5th Cir. 1996) 15, 16

Bifulco v. *United States*, 447 U.S. 381 (1980) 17

Billis v. *United States*, 83 F.3d 209 (8th Cir. 1996) 15

Connecticut National Bank v. *Germain*, 503 U.S. 249 (1992) 16

Demarest v. *Manspeaker*, 498 U.S. 184 (1991) 16

Dolfi v. *Pontesso*, 156 F.3d 696 (6th Cir. 1998) 15, 16

Dowling v. *United States*, 473 U.S. 207 (1985) 16

Evans v. *United States Parole Comm'n*, 78 F.3d 262 (7th Cir. 1996) 15

Fowler v. *United States Parole Comm'n*, 94 F.3d 835 (3d Cir. 1996) 15

Kelly v. *Robinson*, 479 U.S. 36 (1986) 3

Ladner v. *United States*, 358 U.S. 169 (1958) 17

Lynce v. *Mathis*, 519 U.S. 433 (1997) 1

Manso v. *Federal Detention Ctr.*, 182 F.3d 814 (11th Cir. 1999) 15

Rewis v. *United States*, 401 U.S. 808 (1971) 16

Richards v. *United States*, 369 U.S. 1 (1962) 16

Rivers v. *Roadway Express, Inc.*, 511 U.S. 298 (1994) 9

TABLE OF AUTHORITIES – Continued

Page

Robles v. *United States*, 146 F.3d 1098 (9th Cir. 1998) 15

Rubin v. *United States*, 449 U.S. 424 (1981) 16

Smith v. *United States*, 508 U.S. 223 (1993) 17

Strong v. *United States Parole Comm'n*, 141 F.3d 429 (2d Cir. 1998) 15

United States v. *Behnezhad*, 907 F.2d 896 (9th Cir. 1990) 2

United States v. *Cooper*, 962 F.2d 339 (4th Cir. 1992) 2

United States v. *Holmes*, 954 F.2d 270 (5th Cir. 1992) 2, 4, 16

United States v. *Koehler*, 973 F.2d 132 (2d Cir. 1992) 2, 17, 18

United States v. *Malesic*, 18 F.3d 205 (3d Cir. 1994) 2, 3, 12

United States v. *McGee*, 981 F.2d 271 (7th Cir. 1992) 2

United States v. *O'Neil*, 11 F.3d 292 (1st Cir. 1993) 2, 6, 12, 13

United States v. *Robinson*, 106 F.3d 610 (4th Cir. 1997) 15

United States v. *Rockwell*, 984 F.2d 1112 (10th Cir. 1993) 2

United States v. *Schrader*, 973 F.2d 623 (8th Cir. 1992) 2

United States v. *Tatum*, 998 F.2d 893 (11th Cir. 1993) 2

TABLE OF AUTHORITIES – Continued

Page

United States v. *Truss*, 4 F.3d 437 (6th Cir. 1993) ...2, 16

United States Parole Comm'n v. *Williams*, 54 F.3d 820 (D.C. Cir. 1995) 15

Whitney v. *Booker*, 147 F.3d 1280 (10th Cir. 1998) 15

FEDERAL STATUTES

Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 9

Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 8

18 U.S.C. § 401 11

§ 3551 et seq 13

§ 3565(a) (1988) 12, 13

§ 3565(a) (1994) 13

§ 3583(a) 10

§ 3583(e)(3) (1988 & Supp. IV 1992) ... *passim*

§ 3583(h) (1994) 5

§ 3653 (1982) 12

21 U.S.C. § 841 ..... 14, 16

§ 841(c) (repealed 1984) 14

STATE STATUTES

Tenn. Code Ann. § 55-50-501(a) (1998) 6

§ 55-50-502 (1999 Supp.) 6

§ 55-50-503 (1998) 6

TABLE OF AUTHORITIES – Continued

Page

CONGRESSIONAL HISTORY

139 Cong. Rec. S2090-02, at 2150 (daily ed. Feb. 25, 1993) (statement of Sen. Thurmond, sponsor) 8

S. Rep. No. 98-225 (1983) 10

OTHER AUTHORITIES

Black's Law Dictionary (6th ed. 1990) 3, 4

The American Century Dictionary (1995) 4

Webster's Ninth New Collegiate Dictionary (1991) 4

REPLY BRIEF FOR PETITIONER CORNELL JOHNSON

Respondent effectively concedes the Ex Post Facto violation in this case. According to Respondent, "when the district court revoked petitioner's supervised release, it imposed a total restraint on petitioner's liberty (combined reimprisonment and supervised release) longer than the total duration of reimprisonment authorized under prior law." Gov't Br. 16-17. Respondent's sole argument in support of Mr. Johnson's sentence is thus that, "even before [section 3583(h)] was enacted, district courts had the authority under 18 U.S.C. [§] 35[8]3(e)(3) (1988 & Supp. IV 1992) to order offenders to serve a term of reimprisonment followed by a renewed term of supervised release." Gov't Br. 14. Respondent is incorrect about the power that the pre-amendment version of section 3583(e)(3) gave to district courts, and Mr. Johnson's sentence cannot stand.

I. The District Court Had No Authority, Prior to Enactment of Section 3583(h) in 1994, to Reimpose a Term of Supervised Release Following Imprisonment for One Whose Supervised Release Was Revoked.

In general terms, a law violates the prohibitions of the Ex Post Facto Clause if it is retrospective in application and it disadvantages the offender affected by the law by increasing the punishment for the crime. See *Lynce* v. *Mathis*, 519 U.S. 433, 441 (1997). Respondent does not challenge whether application of section 3583(h) in this case is retrospective. Gov't Br. 17. However, Respondent contends that application of section 3583(h) does not disadvantage Petitioner because "even before [section

3583(h)] was enacted, the district courts already had the authority, when revoking an offender's supervised release, to order the offender to serve a term of incarceration followed by a renewed period of supervised release, if the combined period was no greater than the original period of supervised release imposed on the offender." Gov't Br. 18.

Respondent's position is contrary to the text and history of section 3583(e)(3) and to the holdings of a majority of the circuit courts that have interpreted the statute. Only two of the circuit courts of appeals (the First and Eighth Circuits)[1] adopted Respondent's construction of the pre-1994 version of section 3583(e)(3). Nine others (the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits)[2] rejected such an interpretation. The majority rule is the better reasoned.

A. The Text of the Statute Plainly Did Not Authorize Reimposition of Supervised Release.

The pre-1994 version of subsection (e)(3) was one of four mutually exclusive options available to the district

---

[1] *See United States* v. *O'Neil*, 11 F.3d 292, 293 (1st Cir. 1993); *United States* v. *Schrader*, 973 F.2d 623, 625 (8th Cir. 1992).

[2] *See United States* v. *Koehler*, 973 F.2d 132, 134-36 (2d Cir. 1992); *United States* v. *Malesic*, 18 F.3d 205, 206 (3d Cir. 1994); *United States* v. *Cooper*, 962 F.2d 339, 341-42 (4th Cir. 1992); *United States* v. *Holmes*, 954 F.2d 270, 272-73 (5th Cir. 1992); *United States* v. *Truss*, 4 F.3d 437, 441 (6th Cir. 1993); *United States* v. *McGee*, 981 F.2d 271, 274-76 (7th Cir. 1992); *United States* v. *Behnezhad*, 907 F.2d 896, 898-99 (9th Cir. 1990); *United States* v. *Rockwell*, 984 F.2d 1112, 1116-17 (10th Cir. 1993); *United States* v. *Tatum*, 998 F.2d 893, 895-96 (11th Cir. 1993).

court for reviewing an offender's progress on supervised release. It was the *only* option in effect at the time of Petitioner's conviction to address a revocation of supervised release. Respondent argues that the plain text of subsection 3583(e)(3) provided district courts with the authority to reimpose supervised release. Respondent's argument requires a definition of the term "revoke" that is "strained and not faithful to ordinary legal usage." *United States* v. *Malesic*, 18 F.3d 205, 207 (3rd Cir. 1994) (vacating subsequent supervised release term imposed under the pre-1994 version of subsection (e)(3)).

The "starting point in every case involving construction of a statute is the language itself." *Kelly* v. *Robinson*, 479 U.S. 36, 43 (1986) (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)). Section 3583(e)(3) authorized the district court to "revoke" a term of supervised release.[3] "Revoke" plainly means "[t]o annul or make void by recalling or taking back. To cancel, rescind, repeal or reverse, as to revoke a license or will." See *Black's Law Dictionary* 1322 (6th ed.

---

[3] Under the pre-1994 version of subsection (e)(3), the district court, after considering factors pertaining to imposition of sentence, could "revoke a term of supervised release, and require the person to serve in prison all or part of the term of supervised release without credit for time previously served on postrelease supervision, . . . except that a person whose term is revoked under this paragraph may not be required to serve more than 3 years in prison if the offense for which the person was convicted was a Class B felony, or more than 2 years in prison if the offense was a Class C or D felony[.]" 18 U.S.C. § 3583(e)(3) (1988 & Supp. IV 1992).

1990).[4] Thus, "[o]nce a term of supervised release has been revoked under § 3583(e)(3), there is nothing left to extend, modify, reduce or enlarge under § 3583(e)(2). The term of release no longer exists." *United States* v. *Holmes*, 954 F.2d 270, 272 (5th Cir. 1992).

If additional illumination of the meaning of "revoke" were required, it is found in the definition of "revocation." This definition demonstrates, without strain or extrapolation, that "revoke" represents the termination of supervised release and the imposition of a prison term. "In criminal law, [revocation] may refer to termination of a probation or parole order because of either a rule violation or a new offense, and forcing the offender to begin or continue serving his or her sentence." *Black's Law Dictionary* 1321 (6th ed. 1990). Thus, revocation of an order for non-detentive supervision terminates such supervision and results in commencement of a term of imprisonment.

A revocation under subsection (e)(3) logically results in the termination of supervised release and service of a term in prison. Imposition of a subsequent term of supervised release is thus a further action which, however much Respondent tries, cannot now be read into subsection (e)(3). The pre-1994 version of subsection (e)(3) (as well as the current version) defined the scope of the *prison term* that a district court could impose on an offender upon revocation of supervised release. Subsection (e)(3) provided, in relevant part: "a person whose

---

[4] "Revoke" is also defined as "1. to annul by recalling or taking back: rescind. 2. to bring or call back," *Webster's Ninth New Collegiate Dictionary* 1010 (1991), or "withdraw, cancel," *The American Century Dictionary* 497 (1995).

term is revoked under this paragraph may not be required to serve more than 3 years *in prison* if the offense for which the person was convicted was a Class B felony, or more than 2 years *in prison* if the offense was a Class C or D felony[.]" 18 U.S.C. § 3583(e)(3) (1988 & Supp. IV 1992) (emphasis supplied). In placing such limits on the prison terms that may be imposed upon revocation, subsection (e)(3) made no mention of reimposing or reinstating the term of supervised release as a further sanction.

Congress's later enactment of subsection (h) expressly recognized that subsection (e)(3) dealt with imprisonment and thus defined the scope and limits of any new term of supervised release in a separate, new subsection. Subsection (h) states, in relevant part, that

> [w]hen a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term of imprisonment authorized under subsection (e)(3), the court may include a requirement that the defendant be placed on a term of supervised release *after imprisonment*. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

18 U.S.C. § 3583(h) (1994) (emphasis supplied). According to the structure of the current statute and the omission of any reference to supervised release in subsection (e)(3), Congress never intended, now or earlier, that subsection (e)(3) would serve as the basis for reimposition of supervised release.

Respondent relies upon crabbed definitions of "revoke" and argues that the term means "to call back" or "to undo." Respondent thereby suggests that supervised release, once revoked under subsection (e)(3), may simply be reimposed. Gov't Br. 24; *United States* v. *O'Neil*, 11 F.3d 292, 295 (1st Cir. 1993) ("[I]f a term has been called back, it may be reimposed."). Nothing in the common definition of revoke contemplates such a reinstatement or reimposition. For example, a driver's license may be revoked upon a finding that the driver has committed a serious offense. See, *e.g.*, Tenn. Code Ann. § 55-50-501(a) (1998). A license once revoked results in the complete termination of the driving privilege, *id.*, and the license must be surrendered. See Tenn. Code Ann. § 55-50-503 (1998). To again receive driving privileges after revocation, the driver usually must reapply for a new license and comply with initial licensing procedures. See Tenn. Code Ann. § 55-50-502(f)(3) (1999 Supp.). On the other hand, a driver's license may be suspended, rather than revoked, for less serious traffic infractions. See Tenn. Code Ann § 55-50-502(a) (1999 Supp.). Upon satisfying certain conditions to lift the suspension, the driver's privilege to drive may be reinstated without the need to reapply for a license. See Tenn. Code Ann. § 55-50-502(f)(1) (1999 Supp.). Respondent thus contends, in effect, that "revoke" in subsection (e)(3) should be construed as if it were "suspend." Such a tortured construction, which flies in the face of ordinary legal usage, should be rejected.

Respondent similarly strains the definitions for words and phrases used in subsection (e)(3), such as "the term," " 'serve in prison' all or part of the term of supervised release" and "credit for time previously served on

postrelease supervision." Gov't Br. 25-26 (quoting 18 U.S.C. § 3853(e)(3) (1988 & Supp. IV. 1992)). However, these words and phrases in subsection (e)(3) serve only as limitations upon the subsequent prison term to be imposed following revocation. They cannot reasonably be read to permit a district court also to impose an additional form of punishment (other than a prison term) merely because there is reference in the subsection to the *original* term of supervised release. Congress certainly intended that the district court would have the authority to send a non-compliant offender back to prison upon revoking the offender's order for supervised release, and that a term in prison would be ordered without reducing it for time spent successfully on supervised release. To read more into subsection (e)(3), however, places a burden on the language of the statute that it cannot carry.

Respondent's argument also fails to explain why Congress saw fit to enact a separate subsection (h) rather than merely clarify the actual authority granted in subsection (e)(3). Subsection (h) explicitly authorized, for the first time, the reimposition of supervised release following incarceration for revocation. In introducing the Probation and Supervised Release Revocation Act of 1993, which included proposal of subsection (h), Senator Thurmond, the bill's sponsor, advised the Senate that "[t]here is widespread and growing confusion in the Federal Courts regarding what sanctions a court may impose when it revokes an offender's term of probation, or supervised release, because the court finds that the offender has violated probation or supervised release

conditions." See 139 Cong. Rec. S2090-02, at 2150 (daily ed. Feb. 25, 1993) (statement of Sen. Thurmond, sponsor). Regarding the reimposition of supervised release, Senator Thurmond stated that

> [t]he bill *authorizes* reimposition of a term of supervised release upon revocation. The third critical provision of the bill – substantively identical to section 2504 of the crime bill conference report – *expressly authorizes* the court to order an additional, limited period of supervision following revocation of supervised release and reimprisonment.

Id. at 2151 (emphasis supplied).

Congress did not authorize district courts to add a new post-reimprisonment supervised release term merely by tinkering with the language of the pre-1994 version of subsection (e)(3), as if to make a pre-existing sentencing power more apparent. Rather, Congress created an altogether new power by adding a new subsection. Had Congress intended to alter, and thereby clarify, the terms of subsection (e)(3), it would have done so in the body of that subsection. But Congress did not add this new power to subsection (e)(3). In fact, when Congress added subsection (h), it also modified *unrelated* terms in subsection (e)(3).[5] These unrelated changes strongly reinforce the conclusion that Congress never intended to authorize the

[5] The amendments to subsection (e)(3) included striking "person" and inserting "defendant," and amending paragraph (e)(3) to add a cap of 5 years on the term of reimprisonment for class A felonies. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110505(2), 108 Stat. 1796, 2016.

reimposition of supervised release under the pre-1994 version of section 3583(e)(3).

Finally, the 1994 enactment did not contain any evidence that Congress intended the amendment to apply retroactively to conduct that arose before its passage. Had Congress been clarifying the district court's powers under subsection (e)(3), the legislative record likely would contain extended discussion of retroactive application of the clarified subsection. But no such discussion appears. Absent clear evidence, the provisions of the newly enacted statute may not be applied retrospectively, due to the presumption against statutory retroactivity. See *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 304-09 (1994).[6]

B. The Purpose of Section 3583(e)(3) Demonstrates the District Court's Authority to Impose a Term in Prison, but Not to Reimpose Supervised Release, upon Revocation.

Supervised release was created by Congress and introduced into the federal criminal justice system in the Sentencing Reform Act of 1984. See Pub. L. No. 98-473, § 212(a)(2), 98 Stat. 1837, 1999. The Sentencing Reform Act authorizes a district court to impose, as part of a

[6] Respondent concedes that, if the Court determines that section (e)(3) does not provide the authority to reimpose supervised release, "the sanction imposed on petitioner for violation of his supervised release in this case must be vacated and the case remanded, because the district court relied on Section 3583(h) to impose a sanction on petitioner that is not within the standard of punishment to which he could have been exposed under prior law." Gov't Br. 35.

sentence, a term of supervised release following a term of imprisonment. See 18 U.S.C. § 3583(a). The "primary goal" of such a term of supervised release is " 'to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release.' " Gov't Br. 3-4, (quoting S. Rep. No. 98-225, at 124 (1983)); *id.* at 26-31. However, Respondent is incorrect in assuming that, upon revocation pursuant to section 3583(e)(3), the same purpose is being served.

Section 3583(e)(3) provides the district court with the specific authority to "treat a violation of a condition of a term of supervised release as contempt of court pursuant to section 401(3) of [Title 18] and to carry out the appropriate contempt proceedings and sanctions as specified in 18 U.S.C. [§] 401." S. Rep. No. 98-225 at 125 (1983). The Senate Judiciary Committee noted that "[i]t is intended that contempt of court proceedings will only be used after repeated or serious violation of the conditions of supervised release." *Id.* The Committee also explained that,

> [i]n past Congresses, the legislative history of the sentencing reform proposal has contemplated use of criminal contempt as a sanction for violation of conditions of post-release supervision. The Probation Committee of the Judicial Conference urged the Committee to expressly state the availability of this sanction in the legislation to avoid confusion, and the Committee has done so.

Id.

As referenced in the Committee Report, 18 U.S.C. § 401 grants the district court the power to "punish by fine or imprisonment, at its discretion, such contempt of its authority" as "disobedience or resistance to its lawful writ, process, order, rule, decree, or command." 18 U.S.C. § 401(3).[7] Thus, the goal, authority and punishment underlying section 3583(e)(3) differ substantially from that pertaining to the imposition of supervised release at initial sentencing. Consequently, Respondent has incorrectly assessed the basic purpose underlying section 3583(e)(3), and ignored that subsection (e)(3) was provided to punish an offender for contempt of court. Moreover, although section 401 permits the district court to exercise wide discretion in punishing an offender's contempt, and although subsection (e)(3) permits the court to exercise discretion in modifying supervised release terms, no exercise of discretion is permitted under (e)(3) except with respect to the offender's subsequent prison term.

C. The Background of the Supervised Release Statute Demonstrates That Congress Initially Intended to Limit the Scope of the Penalties for Supervised Release Revocation.

Respondent argues that the probation, parole, and special parole practices that predated the creation of

---

[7] Section 401 also empowers the court to punish "[m]isbehavior of any person in its presence or so near thereto as to obstruct the administration of justice" and "[m]isbehavior of any of its officers in their official transactions." 18 U.S.C. § 401(1), (2).

supervised release provide support for its construction of the pre-1994 version of subsection (e)(3). Gov't Br. 32-35. In so arguing, Respondent essentially adopts the reasoning set forth by the First Circuit in *United States* v. *O'Neil*, 11 F.3d 292, 298-300 (1st Cir. 1993). But Respondent ignores the impact that the Sentencing Reform Act of 1984 had on probation, parole, and special parole. The Sentencing Reform Act of 1984 represents a "sharp and considered break with the past, rejecting the 'medical model' of penology. This is also true with respect to post-incarceration remedies." *United States* v. *Malesic*, 18 F.3d 205, 207 (3d Cir. 1994). Given this sharp break with the past, Respondent's attempt to draw support from abandoned practices is dubious at best.

For example, Respondent observes that a "similar question arose under the old probation statute" and that a "majority of courts concluded that a new term of probation was a 'sentence' that might be imposed after the court's revocation of the initial term of probation." Gov't Br. 32, citing 18 U.S.C § 3653 (1982). But Respondent ignores the simple fact that Congress has since amended the "old" statute. In 1988, Congress enacted a version of the probation statute that empowered a district court to revoke the sentence of probation and impose "any other sentence" that was available at the time of the initial sentencing. 18 U.S.C. § 3565(a) (1988). Although the question was not before the court, the First Circuit in *O'Neil* acknowledged this "new" sentencing regime (*i.e.*, after supervised release was created, but before section 3583(h) was added), stating that

> it seems probable that Congress intended to depart from prevailing pre-guidelines practice and forbid reimposition of probation following the revocation of a term of probation. We draw this inference from the insertion of the word "other," on the theory that a change in statutory language should be "read, if possible, to have some effect."

11 F.3d at 299 (quoting *American Nat'l Red Cross* v. *S.G.*, 505 U.S. 247, 263 (1992)).[8] In short, when one refers to the more recent probation statute, Respondent's argument fails.

Petitioner agrees with the First Circuit's assessment of Congress' intent in changing the probation revocation statute.[9] In any event, if any lesson can be drawn from the probation revocation statute, it is only that, before the enactment of subsection (h), when a defendant who violated his or her supervised release was reimprisoned, there was no warrant for the district court to impose an additional supervised release term. Just as Congress sharply limited the district court's discretionary authority following probation revocation, it also sharply limited the

---

[8] The *O'Neil* court opined that, "[e]ven if Congress intended to preclude reimposition of probation following revocation of a term of probation, that intention has no implications for supervised release." 11 F.3d at 299 n. 7. "Under the Sentencing Reform Act, a term of probation may not be imposed when a defendant is sentenced to imprisonment. [Statutory citation omitted] Since a 'combined' sentence is prohibited *ab initio*, it would make little sense to allow a combined form of sentencing upon revocation of probation." *Id.*

[9] Congress has again amended the probation revocation statute. It currently empowers a court to "revoke the sentence of probation and resentence the defendant under subchapter A." 18 U.S.C. § 3565(a)(2) (1994). Subchapter A refers to the general sentencing provisions of 18 U.S.C. §§ 3551 *et seq.*

district court's discretionary authority following supervised release revocation.

Respondent also claims that the practice under parole and special parole supports its contention that reimposition of supervised release was authorized under the pre-1994 version of section 3583(e)(3). Special parole, which is governed by 21 U.S.C. § 841, was an additional penalty for all drug offenses and was mandatory in all cases until the Sentencing Reform Act of 1984 replaced it with supervised release.[10] Special parole, somewhat like supervised release, was part of the criminal sentence which a defendant in a narcotics case was required to serve after completing a prison term. The old special parole statute included wording similar to that of section 3583(e)(3):

> A special parole term . . . may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section . . . shall be in addition to, and not in lieu of, any other parole provided for by law.

21 U.S.C. § 841(c) (repealed 1984). Thus, if a person on special parole violates the terms of his supervision, 21

---

[10] Special parole still applies to drug crimes committed before November 1, 1987.

U.S.C. § 841(c) allows the United States Parole Commission to reincarcerate him for all or part of his original "special parole term," without allowing him credit on his jail time for his "street time." The statute is altogether silent on whether the Parole Commission may impose another term of *special* parole upon a prisoner who is reincarcerated for only a part of the original special parole term.

Just as there was disagreement among the circuit courts of appeals as to the authority conferred on district courts by the pre-1994 version of section 3583(e)(3), there is disagreement as to the application of the special parole provision.[11] The majority of the circuit courts of appeals have determined that the special parole statute does not authorize the reimposition of special parole following revocation and incarceration. In fact, many of these courts expressly rely upon similar holdings in subsection (e)(3) cases for precisely the reason that subsection (e)(3),

---

[11] Compare *Billis* v. *United States*, 83 F.3d 209, 211 (8th Cir. 1996) (Parole Commission has authority to re-release on special parole), and *United States Parole Comm'n* v. *Williams*, 54 F.3d 820, 823-24 (D.C. Cir. 1995) (same), with *Dolfi* v. *Pontesso*, 156 F.3d 696 (6th Cir. 1998) (Parole Commission does not have authority to reimpose special parole); *Whitney* v. *Booker*, 147 F.3d 1280 (10th Cir. 1998) (same); *Robles* v. *United States*, 146 F.3d 1098 (9th Cir. 1998) (same); *Strong* v. *United States Parole Comm'n*, 141 F.3d 429 (2d Cir. 1998); *United States v. Robinson*, 106 F.3d 610, 611-13 (4th Cir. 1997) (same); *Fowler v. United States Parole Comm'n*, 94 F.3d 835, 840-41 (3d Cir. 1996) (same); *Evans* v. *United States Parole Comm'n*, 78 F.3d 262, 264-65 (7th Cir. 1996) (same); *Artuso* v. *Hall*, 74 F.3d 68, 71-72 (5th Cir. 1996) (same); and *Manso* v. *Federal Detention Ctr.*, 182 F.3d 814 (11th Cir. 1999) (same).

like 21 U.S.C. § 841(c), simply does not provide for reimposition of supervised release.[12]

II. If the Court Determines That the Statute Is Ambiguous, the Rule of Lenity Requires a Finding That Subsection (e)(3) Did Not Authorize Reimposition of Supervised Release

Criminal statutes are to be strictly construed, see *Dowling* v. *United States*, 473 U.S. 207, 213 (1985), and the words used are to be given their "ordinary meaning." *Richards* v. *United States*, 369 U.S. 1, 9 (1962). We presume that "a legislature says in a statute what it means and means . . . what it says." *Connecticut National Bank* v. *Germain*, 503 U.S. 249, 254 (1992). Further, when the words of a statute are unambiguous, its plain language controls and judicial inquiry is complete, except in "rare and exceptional circumstances" that do not exist here. *Demarest* v. *Manspeaker*, 498 U.S. 184, 190 (1991); *Rubin* v. *United States*, 449 U.S. 424, 430 (1981).

Petitioner has demonstrated that the plain language of the pre-1994 version of 18 U.S.C. § 3583(e)(3) cannot reasonably be construed to permit a further supervised release term. However, in the event that the Court finds genuine ambiguity in 18 U.S.C. § 3583(e), application of the rule of lenity is appropriate. See *Rewis* v. *United States*, 401 U.S. 808, 812 (1971) ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity"). Importantly, Petitioner is not relying upon

---

[12] *See, e.g., Dolfi*, 156 F.3d at 699 (relying on *United States* v. *Truss*, 4 F.3d 437 (6th Cir. 1993)); *Artuso*, 74 F.3d at 71-72 (relying on *United States* v. *Holmes*, 954 F.2d 270 (5th Cir. 1992)).

"[t]he mere possibility of articulating a narrower construction" of section 3583(e). *Smith* v. *United States*, 508 U.S. 223, 239 (1993). A sizable majority of the circuits have articulated the same construction Petitioner suggests.

Under the rule of lenity, a court must not "interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner* v. *United States*, 358 U.S. 169, 178 (1958). The rule of lenity applies not only to substantive criminal statutes, but to sentencing provisions as well. *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980).

At least one court of appeals has relied on the rule of lenity in construing subsection 3583(e)(3). The Second Circuit in *United States* v. *Koehler*, 973 F.2d 132, 134-35 (2d Cir. 1992), surmised that the language of subsection (e)(3) precludes the combination of sentencing options that were imposed upon Petitioner. "Revocation of the original term of supervised release and imposition of a prison term under subdivision (3) of § 3583(e) is linguistically inconsistent with extension or modification of that [supervised release] term under subdivision (2)." *Id.* In *Koehler*, the court concluded that "[a]n interpretation of § 3583 that allowed a term of imprisonment pursuant to subdivision (3) to be followed by a fresh term of supervised release pursuant to subdivision (2) would increase the penalty imposed upon Koehler without any clear

statutory basis for doing so, counter to the rule of lenity." *Id.* at 135.[13]

---

[13] Respondent's brief addresses a number of matters that have no application to this case. For example, although Respondent questions at length whether the Ex Post Facto Clause is implicated where the minimum sanction authorized by the prior law is not affected by a change in the law and points out that this Court has not addressed such a situation, Gov't Br. 36-42, Respondent concedes that "[i]f the sole issue is whether the standard of punishment increased, Section 3583(h) would be considered an ex post facto law in all applications to pre-enactment offenders." *Id.* at 36. Similarly, Respondent questions whether the Ex Post Facto Clause is implicated where the legislature has only increased the maximum sentence authorized for an offense where the defendant was sentenced within the range authorized by prior law, Gov't Br. 36-42. Ultimately, Respondent concedes that "[t]his case, however, does not present an occasion for the Court to consider the possibility that the mere increase in a statutory maximum sentence does not violate the Ex Post Facto Clause as applied to a defendant sentenced within the range authorized under prior law." Gov't Br. 42-43. Petitioner expresses no view on these collateral matters.

CONCLUSION

For these reasons, and for the reasons stated in petitioner's opening brief, the decision below should be reversed.

Respectfully submitted,

JEFFREY T. GREEN
JOSEPH S. MILLER
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

LEAH J. PREWITT
RITA C. LALUMIA*
Federal Defender Service
of Eastern Tennessee, Inc.
707 Georgia Avenue
Suite 203
Chattanooga, Tennessee 37402
(423) 756-4349

Of Counsel

Counsel for Petitioner Cornell Johnson

**Counsel of Record*

DEC 2 1999

No. 99-5153

Supreme Court, U.S.
FILED
DEC 2 1999
CLERK

In The

Supreme Court of the United States

CORNELL JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF PETITIONER

EDWARD M. CHIKOFSKY
Counsel of Record
301 East 87th Street
New York NY 10128
(212) 289-1062

BARBARA E. BERGMAN
UNM School of Law
1117 Stanford, N.E.
Albuquerque NM 87131
(505) 277-3304

Counsel for Amici

QUESTION PRESENTED

Whether the imposition of a renewed term of supervised release following revocation of an earlier term of such release violates the *Ex Post Facto* Clause of the Constitution (Art. I, §9, Cl. 3) where the statute in effect at the time of petitioner's original offense did not provide for such a renewed term.

TABLE OF CONTENTS

Interest of *Amici* 1

Statement of the Case 2

Summary of Argument 3

Argument:

The imposition of a renewed term of supervised release after revocation violates the *ex post facto* clause where the statute in effect at the time of the original criminal offense did not provide for such a renewal 5

Conclusion 10

TABLE OF AUTHORITIES

Cases

Calder v. Bull, 3 U.S. (Dall.) 386 (1798) 5

Calif. Dept. of Corrections v. Morales, 514 U.S. 499 (1995) 6

Collins v. Youngblood, 497 U.S. 37 (1990) 6

Dobbert v. Florida, 432 U.S. 282 (1977) 5

Greenfield v. Scafati, 277 F.Supp. 644 (D. Mass. 1967), *aff'd mem.*, 390 U.S. 713 (1968) 7

Hicks v. Miranda, 422 U.S. 332 (1975) 7

Landgraf v. USI Film Products, 511 U.S. 244 (1994) 5

Lindsay v. Washington, 301 U.S. 397 (1937) 6

Lynce v. Mathis, 519 U.S. 433 (1997) 6

Miller v. Florida, 482 U.S. 423 (1987) 5

United States v. Collins, 118 F.3d 1394 (9th Cir. 1997) 3

United States v. Dozier, 119 F.3d 239 (3d Cir. 1997) 3

United States v. Lominac, 144 F.3d 308 (4th Cir. 1998) 3

United States v. Meeks, 25 F.3d 1117 (2d Cir. 1994) 3

United States v. Paskow, 11 F.3d 873 (9th Cir. 1993) 8

Weaver v. Graham, 450 U.S. 24 (1981) 5

Miscellaneous

Krent, *The Puzzling Boundary Between Criminal And Civil Lawmaking*, 84 Geo. L.J. 2143 (1996) 5

Zenga, Note, *Retroactive Law Or Punishment For A New Offense? – The Ex Post Facto Implications Of Amending The Statutory Provisions Governing Violations Of Super-Vised Release*, 19 W. New Eng. L. Rev. 499 (1997) 7

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF PETITIONER

INTEREST OF *AMICI*

The National Association of Criminal Defense Lawyers is a District of Columbia non-profit corporation with a membership of more than 10,000 attorneys nationwide – along with 80 state and local affiliate organizations numbering 28,000 members in fifty states. NACDL was founded in 1958 to promote study and research in the field of criminal law and procedure, to disseminate and advance knowledge of the law in the area of criminal justice and practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases in the state and federal courts. Foremost among NACDL's objectives is to promote the proper administration of justice. It has appeared before this Court as *amicus curiae* on numerous occasions. *See, e.g., Jones v. United States*, 119 S.Ct. 1215 (1999).

The Association of Federal Defenders was formed in 1995 to enhance the representation provided under the Criminal Justice Act (18 U.S.C. §3006A) and the Sixth Amendment to the Constitution of the United States. It is a non-profit volunteer organization whose membership includes attorneys and support staff of Federal Defender offices nationwide. One of AFD's missions is to file *amicus curiae* briefs to ensure that the position of indigent defendants in the criminal justice system is properly represented.[1]

---

[1] Both parties have consented to the appearance of NACDL and AFD as *amicus curiae* in this matter. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. Rule 37.6.

STATEMENT OF THE CASE

On March 8, 1994, petitioner Cornell Johnson was convicted upon his guilty plea to one count of conspiring to defraud, produce, use and traffic in a counterfeit access device, in violation of 18 U.S.C. §1029(b)(2). This offense is classified as a Class D felony under 18 U.S.C. §3559(a)(4). Petitioner was sentenced to 25 months' imprisonment, to be followed by three years' supervised release. Pet. App. 1a.

After his release from imprisonment and while on supervised release, petitioner left the judicial district without permission and committed various state-law offenses in Virginia. The district court revoked petitioner's supervised release and ordered him reincarcerated for 18 months, to be followed by a renewed term of 12 months' supervised release. *Id.*

At the time of petitioner's original offense, violations of supervised release were governed by 18 U.S.C. §3583(e), which provided that, upon an offender's violation of supervised release, the district court was authorized to "revoke a term of supervised release, and require the person to serve in prison all or part of the term of supervised release without credit for time previously served on post-release supervision." Section 3583(e)(3).[2]

Effective September 13, 1994 – after petitioner committed the underlying offenses for which he was

[2] The courts of appeals reached conflicting views as to whether the statute authorized a district court to order an offender who violated supervised release to serve a combined term of reimprisonment and renewed supervised release. Nine of eleven circuits determined that the district court was limited to imposing only a new term of imprisonment. *See* cases collected at Cert. Opp. 3 & n.2. As noted *infra*, this statutory ambiguity was corrected by the subsequent enactment of §3583(h).

convicted, but before he violated the terms of his supervised release – Congress enacted 18 U.S.C. §3583(h).[3] Subsection (h) made clear that, when a defendant's term of supervised release is revoked and he is ordered to serve a term of reimprisonment, the district court may now also impose a renewed term of supervised release after the completion of reimprisonment. For these purposes, the defendant is not entitled to any credit for the time spent on the original supervised release term before it was revoked. 18 U.S.C. §3583(e)(3) and (h).

The court of appeals affirmed the revocation of petitioner's supervised release, rejecting his argument that the application of §3583(h) to his case violated the *Ex Post Facto* Clause of the Constitution. Pet. App. 1a-2a. The court nonetheless recognized that its decision was directly contrary to the decisions of four other courts of appeals which all concluded that the application of §3583(h) to defendants whose underlying offenses were committed prior to enactment of the statute violated the *Ex Post Facto* Clause. *Id., citing United States v. Lominac*, 144 F.3d 308 (4th Cir. 1998); *United States v. Dozier*, 119 F.3d 239 (3d Cir. 1997); *United States v. Collins*, 118 F.3d 1394 (9th Cir. 1997); and *United States v. Meeks*, 25 F.3d 1117 (2d Cir. 1994).

SUMMARY OF ARGUMENT

The constitutional prohibition on *ex post facto* laws seeks to curb the enactment and enforcement of arbitrary legislation and to assure that individuals have fair warning of the potential legal consequences of their conduct in advance. To constitute an *ex post facto* law, the provision in question, first, must change the legal consequences of acts completed

[3] *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 2017 (1994).

before its effective date and, second, must disadvantage the offender affected by it.

In this case, the statutory provision in effect at the time of petitioner's original crime in 1993 provided that revocation of supervised release authorized reimprisonment for up to 2 years but without any subsequent renewed supervised release. After petitioner's conviction, but before his violation of supervised release, Congress enacted a new statute providing for renewed supervised release in addition to reimprisonment for violations of supervised release.

Petitioner's resentencing to an aggregate total of thirty months' combined reimprisonment/renewed supervised release exceeded by six months the length of the two years' reimprisonment that was permissible under the statute in effect at the time of petitioner's underlying offense. Supervised release is part of the original sentence, much like parole or probation, and, as such, constitutes as much an integral part of the punishment as actual incarceration. Since the aggregate penalty imposed under the amended statute exceeded the maximum penalty permissible under the statute in effect at the time of the underlying offense, the penalty imposed on resentencing violated the *Ex Post Facto* Clause of the Constitution.

ARGUMENT

THE IMPOSITION OF A RENEWED TERM OF SUPERVISED RELEASE AFTER REVOCATION VIOLATES THE *EX POST FACTO* CLAUSE WHERE THE STATUTE IN EFFECT AT THE TIME OF THE ORIGINAL CRIMINAL OFFENSE DID NOT PROVIDE FOR SUCH A RENEWAL

The Constitution prohibits Congress from passing *ex post facto* laws in the criminal context. U.S. Const., Art. I, §9, Cl. 3; *see also id.*, Art. I, §10, Cl. 1 ("No State shall … pass any … ex post facto Law"). The prohibition against *ex post facto* laws embodies two principle concerns. First, it helps to prevent legislative abuses by curbing the "enact[ment of] arbitrary or vindictive legislation." *Miller v. Florida*, 482 U.S. 423, 429 (1987); *Dobbert v. Florida*, 432 U.S. 282, 293 (1977); *Calder v. Bull*, 3 U.S. (Dall.) 386, 389 (1798); *see also Landgraf v. USI Film Products*, 511 U.S. 244, 266-67 (1994). Second, it helps "to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981); *Miller*, 482 U.S. at 430.[4]

In *Miller*, this Court articulated a two-pronged test for determining when application of a statute violates the constitutional prohibition. Before a statute may be said to be an *ex post facto* law, "first, the law 'must be retrospective, that is, it must apply to events occurring before its enactment,' and second 'it must disadvantage the offender

---

[4] *See also* Harold J. Krent, *The Puzzling Boundary Between Criminal And Civil Retroactive Lawmaking*, 84 Geo. L.J. 2143, 2173 n.163 (1996)("Drawing the line to prevent retroactive application of any law imposing greater obstacles to an inmate's early release from prison reflects a sensible prophylactic means to prevent vindictive increases of punishment").

affected by it.'" *Miller*, 482 U.S. at 430 (quoting *Weaver*, 450 U.S. at 29).

With respect to retroactivity, "[t]he critical question is whether the law changes the legal consequences of acts completed before its effective date." *Weaver*, 450 U.S. at 31. The "events" and completed "acts" referred to in *Miller* and *Weaver* are the defendant's underlying criminal offenses, whether or not a plea of guilty or a conviction occurred *after* the effective date of the new law. *Weaver*, 450 U.S. at 30; *see also Lynce v. Mathis*, 519 U.S. 433, 441 (1997); *California Dept. of Corrections v. Morales*, 514 U.S. 499, 504 (1995); *Collins v. Youngblood*, 497 U.S. 37, 43, 50 (1990).[5]

Moreover, "one is not barred from challenging a change in the penal code on ex post facto grounds simply because the sentence imposed under the new law was not more onerous than that which he might have received under the old." *Dobbert*, 432 U.S. 432 U.S. at 300; *Miller*, 482 U.S. at 432. Because "the Ex Post Facto Clause looks to the standard of punishment prescribed by the statute, rather than to the sentence actually imposed ... an increase in the possible penalty is ex post facto regardless of the length of the sentence actually imposed ...." *Lindsay v. Washington*, 301 U.S. 397, 401 (1937); *see also Morales*, 514 U.S. at 510 n.6.

In the instant case, of course, the prejudice to petitioner was not merely hypothetical. Under the statutory provisions governing the revocation of supervised release in effect at the time of his original offense in 1993 -- §3583(e)(3) – the district court was authorized to impose two years' reimprisonment following revocation because petitioner's underlying offense was a Class D felony. *See*

[5] In the instant case, petitioner's original crime, plea and sentence all predated the effective date of newly-enacted §3583(h) – September 13, 1994. Only the revocation violations occurred after that date.

Cert. Opp. 8-9.[6] Here, petitioner was resentenced to a term of 18 months' reincarceration to be followed by a twelve-month period of renewed supervised release. In other words, petitioner was resentenced to a combined "package" totalling thirty months of reimprisonment/renewed supervised release where he could have been sentenced to a total of only 24 months' imprisonment *simpliciter* under the statutory provision in effect at the time he committed his underlying criminal offense.

Statutes that alter the consequences of violations of parole, probation or supervised release, as applied to prisoners or parolees whose underlying offenses occurred prior to passage of the statutes, have consistently been held to violate the *Ex Post Facto* Clause because the increased burden imposed operates to enhance the penalty for the underlying offense. *See* Ryan M. Zenga, Note, *Retroactive Law Or Punishment For A New Offense? – The Ex Post Facto Implications Of Amending The Statutory Provisions Governing Violations Of Supervised Release*, 19 W. New Eng. L. Rev. 499 (1997). *See also Meeks*, 25 F.3d at 1120 (discussing *Greenfield v. Scafati*, 277 F.Supp. 644, 645-46 (D. Mass. 1967)(three-judge court), *affd mem.*, 390 U.S. 713 (1968)[7]).

Supervised release, like parole, is an integral part of the punishment for the underlying offense:

> Under each, a defendant serves a portion of a sentence in prison and a portion under supervision

[6] Section 3583(h) expanded revocation penalties for Class D felonies beyond the two years' reimprisonment provided in §3583(e)(3) by explicitly allowing the district court to tack on an additional term of one year's renewed supervised release. *See Dozier*, 119 F.3d at 241-42.

7 This Court's summary affirmance in *Greenfield* constitutes an affirmance on the merits. *Meeks*, 25 F.3d at 1120 (*citing Hicks v. Miranda*, 422 U.S. 332, 344 (1975)).

> outside prison walls. If a defendant violates the terms of his release, he may be incarcerated once more under the terms of his original sentence. More specifically, a defendant's original sentence determines the length of the term of parole (indirectly) or supervised release (directly). It is also the original sentence that establishes how long the defendant may be required to serve following revocation of both parole and supervised release.

United States v. Paskow, 11 F.3d 873, 881 (9th Cir. 1993); *see also id.* at 883 (supervised release is "simply part of the whole matrix of punishment which arises out of a defendant's original crimes").

Sentencing petitioner pursuant to §3583(h) rather than §3583(e) thus affected the resentencing to which he was subject in at least two important respects. First, it allowed imposition of a new term of supervised release, whereas prior to §3583(h) petitioner would have been free of all supervision following whatever reincarceration the district court imposed. Second, it allowed the court to impose a "total package" of penalties stretching to 30 months – rather than only 24 months – the maximum period of incarceration authorized under §3583(e)(3). These effects of §3583(h) thus "increase the penalty" to which petitioner is subject. As the Third Circuit noted in precisely this context (*Dozier*, 119 F.3d at 242-43):

> Supervised release is punishment; it is a deprivation of some portion of one's liberty imposed as a punitive measure for a bad act. A defendant on supervised release is subject to various terms and conditions which restrict his freedom and make him vulnerable to further punishment should he violate them. Such subsequent punishment may again include more imprisonment and more supervised release. The length of the "total package", therefore,

> is the length of time the defendant suffers either a total or substantial deprivation of his liberty. It is the measure of the period to which he is subject to government supervision. Increasing that length from a maximum of 24 months to a maximum of 36 months clearly increases the penalty authorized upon revocation of supervised release.

In *Lynce v. Mathis*, 519 U.S. at 443, this Court reiterated its earlier holdings in *Collins* and *Morales* that while "speculative and attenuated possibilities" of increasing the measure of punishment do not implicate *ex post facto* concerns, any increase in the "quantum of punishment" or the length of the penalty by which a crime is punishable runs afoul of the prohibition against *ex post facto* laws. *See also Lominac*, 144 F.3d at 312-15.

In this case, prejudice to petitioner is neither speculative nor attenuated. On revocation of his original term of supervised release, he was resentenced to a "total package" of reincarceration/renewed supervision that exceeded by six months the total length of the revocation penalty to which he was originally subject at the time of his underlying crime, plea and original sentence. Accordingly, he has made out an actionable violation of his rights under the *Ex Post Facto* Clause of the Constitution. *Lominac*, 144 F.3d at 313-14.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

EDWARD M. CHIKOFSKY
Counsel of Record
301 East 87th Street
New York NY 10128
(212) 289-1062

BARBARA E. BERGMAN
UNM School of Law
1117 Stanford N.E.
Albuquerque NM 97131
(505) 277-3304

December 1999